

Moral rights in The Conflict-of-Laws: Alternatives to the Copyright Qualifications

Submitted by

Hanan Mohamed Almawla

Queen Mary, University of London

Thesis submitted for the degree of Doctor of Philosophy

Supervisors: Professor Guido Westkamp and Professor Uma Suthersanen

Completed December 2012

Declaration

I declare that the work presented in this thesis is the result of my own research, undertaken at the School of Law, Queen Mary, University of London.

Hanan Mohammed Almawla

December 2012

Abstract

This thesis examines the intersection between authors' moral rights and conflict-of-laws. The research question has been triggered by two important, interlinked factors. The first is that the currently applicable choice-of-law rules to moral rights are the same as those applicable to copyright. The second concerns the fact that moral rights are different from copyright - both in their nature and in the interest they aim to protect. Since these two factors coincide, it is questionable whether it ought to be the case that moral rights are subjected to the same choice-of-law rules as are applicable to copyright.

The thesis therefore aims to discover whether the currently applicable choice-of-law rules available in the context of moral rights are suitable for achieving the goals and objectives of conflict-of-laws. In the course of this thesis, I evaluate the potential validity of detaching moral rights from copyright in conflict-of-laws and instead attaching it to the characterization model of general personality rights.

The research question is mainly addressed from the perspective of Rome I and Rome II Regulations. However, as there is no EU harmonization concerning general personality rights in conflict-of-laws, the examination will be directed towards France and England as examples of civil and common law traditions. Moreover, reference will also be made to CLIP and ALI principles by reason of comparison.

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Acknowledgements

I would like to thank, first and foremost, my supervisors, Professor Guido Westkamp and Professor Uma Suthersanen for supervising my research.

I thank Professor Westkamp, for the precious time and great efforts he dedicated to the supervision of this thesis, and for encouraging me to participate in the 12th and 13th EIPIN Congresses.

I thank Professor Suthersanen, for her comments and advise at the initial and final stages of my work.

I am indebted to my precious family, for their love and support. Above all, I am grateful to my mother, for her unconditional love and affection. I am grateful to my father, for his support and invaluable legal opinions. And I am thankful to my husband, for his deep love and belief in me.

I thank my friends in Bahrain, for their tireless care and help through the duration of my doctoral degree.

I thank my friends and colleagues in London, for enriching my educational experience.

I thank University of Bahrain for their sponsorship.

Abbreviations

Acronyms

AC – Law Reports, Appeal Cases

ALAI - Association Litteraire et artistique International – International Literary and Artist Association

ALI – American Law Institute

All ER – All England Law Reports

CA – Court of Appeal

Ch/Ch D – Law Reports, Chancery Division

Civ – Civil Division

CLIP - The European Max Planck Group on Conflict of Laws in Intellectual Property

ECtHR – European Court of Human Rights

ECJ – European Court of Justice

ER – English Reports

EU – European Union

EWCA – England and Wales Court of Appeal

EWHC – England and Wales High Court

FSR – Fleet Street Reports

GATT- General Agreement on Tariff and Trade

IP – Intellectual Property

PIL – Private International Law

QB/QBD — Law Reports, Queen's Bench Division

UK – United Kingdom

UKHL – United Kingdom House of Lords

US / USA – United States of America

WIPO – World Intellectual Property Organisation

WTO – World Trade Organisation

Journals

Brook. J. INT'L L. – Brooklyn Journal of International Law
Buff. L. Rev. – Buffalo Law Review
Case W. Res. J. Int'l L. – Case Western Reserve Journal of International Law
EIPR – European Intellectual Property Review
EMLR – Entertainment and Media Law Reports
Ent. L.R. – Entertainment Law Review
Ga. L. Rev. – Georgia Law Review
Harv. Int'l L.J. – Harvard International Law Journal
ICLQ – International and Comparative Law Quarterly
IIC – International Review of Intellectual Property and Competition Law
IJL&IT – International Journal of Law and Information Technology
Int'l & Comp. L. Q. – International and Comparative Law Quarterly
IPQ – Intellectual Property Quarterly
IPR – Intellectual Property Reports
JIPLP – Journal of Intellectual Property Law and Practice
Loy. L. Rev. – Loyola Law Review
LQR – Law Quarterly Review
RIDA – Revue Internationale de Droit d'Auteur
Tul. L. Rev. – Tulane Law Review

Legislations

BC – Berne Convention
CDPA – Copyright, Designs and Patents Act
DMCA - Digital Millennium Copyright Act
ECHR – European Convention on Human Rights
InfoSoc – Information Society Directive
TRIPS – Agreement on Trade-Related Aspects of Intellectual Property Rights
UCC – Universal Copyright Convention
UDHR – Universal Declaration of Human Rights
WCT – WIPO Copyright Treaty
WPPT – WIPO Performers and Phonograms Treaty

Table of legislation

International

Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (15 April 1994)

Berne Convention for the Protection of Literary and Artistic Works (September 9, 1886 - revised July 24, 1971 and amended 1979)

Hague Convention on Choice of Courts Agreements (concluded 30 June 2005)

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961 (Rome Convention)

Universal Copyright Convention of 1952

Universal Declaration of Human Rights 1948

WIPO Copyright Treaty of 1996

WIPO Performances and Phonograms Treaty of 1996

European Union

Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1

Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights

Regulation (EC) 864/2007 of The European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40

Regulation (EC) 593/2008 of The European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2007] OJ L177/6

National

Bahrain

Act no 22 / 2006 concerning the Protection of Author's right and Neighbouring Rights

Civil and Commercial Procedures Act of Bahrain for the year 1971

France

Code de la Propriété Intellectuelle 1992 (Intellectual Property Code 1992 English text published by WIPO)

UK

Copyright Act 1956

Copyright, Designs and Patents Act 1988

Human Rights Act 1998

Private International Law (Miscellaneous Provisions) Act 1995

Statute of Anne 1710

USA

The Visual Artists Rights Act 1990 (VARA)

Table of cases

Arab Sates

Egypt

Almashrabia restaurant case: Jeeza First instant court / 11th civilian circle in 22nd May 1999 – case number 8610 for the year 1989 civilian Jeeza

Jordan

The Jordanian Court of Cassation case number: 2648/2003 on the 11th Nov 2003

Sudan

'Theatre for life' case: Khartoum court of summary justice / civilian case 1337 for the year 1998 on 16th Nov 1999

England

Archbold, Esq v Sweet (1832) 172 ER 947.

Campbell v. MGN Ltd [2004] E.M.L.R. 15

Confetti records & others v Warner Music UK Ltd [2003] EWHC civ 1748

Douglas v Hello! [2001] QB 967.

Frisby v BBC [1967] 2 WLR 1204.

Irvin v Irvin [2001] 1 FLR 178.

Moore v News of the world and another [1972] 1 All ER 915.

Newspaper Licensing Agency Ltd v Meltwater Holding BV [2011] EWCA Civ 890.

Prince Albert v Strange (1849) 1 Mac & G 25.

Samuelson v Producers Distributing [1932] 1 Ch.201.

Wainwright v. Home office [2003] 4 All ER 969

Southey v Sherwood (1817) 2 Mer 435 (Ch)

European Community

Fiona Shevill and Others (C-68/93)

Infopaq International A/S v Danske Dagblades Forening (C-5/08)

Painer v Standard Verlags GmbH (C-145/10)

Tod's SpA and Tod's France SARL v Heyraud SA (C- 28/04)

France

Anne Bragance v Olivier Orban and Michel de Grece (1989) 142 RIDA 301.

Beineix v StudioCanal Image, Nanterre Tribunal de Grande Instance, Référé, December 4, (2002).

Buffet c. Fersing, Cour d'appel, Paris, 1962 Dalloz, Jurisprudence 570.

Camoin et Syndicat de la propriete artistique c. Francis Carco, Aubry, Belattre et Zborowski, (1927) Trib. Civ. De la Seine (judgement confirmed by the Cour D'Appel de Paris, 6 March 1931)

D Barbelivien v Sté Agence Business (2003) 196 R.I.D.A. 280.

Gordon & Breach Inc. V The American Institute for Physics et al (1998) 175 RIDA 268.

Martinelli v Gallimard, (2003) 198 R.I.D.A. 413.

Richebe v. Charlie Chaplin (1960) 28 RIDA 133

Rowe v Walt Disney [1987] F.S.R 36 (Cour D'Appel Paris)

Societe Fox – Europa v Societe le Chat du Monde, (1960) 28 RIDA 120

Turner Entertainment Company v. Huston (1991) 149 RIDA 197.

United States of America

Shostakovich v. Twentieth Century-Fox Film Corp, 1948, 80 N.Y.S.2d 575

Part 1

Introduction

A. Research question and importance:

This thesis is intended to answer the following research question: Are the currently applicable choice-of-law rules to copyright designed with authors' moral rights in mind or should authors' moral rights be detached from copyright in conflict-of-laws?

The importance of this research question is ascribed to the rapid development in technologies that have helped many creators become their own publishers in an increasingly borderless world. The internet, the crucial medium in this regard, has helped creators publish and communicate their works to the public at a low cost. This innovation however, has brought with it serious disadvantages the most important of which related to the fact that creators' works are subject to innumerable copyright and moral rights infringements. Most importantly, these infringements often involve one or more foreign elements, something which leads to questions of choice-of-law.

In recent years, the importance of determining the applicable law to cross-border copyright disputes has received serious attention, and there has been much research dedicated to addressing this issue including text books, PhD theses, and journal articles¹.

¹ For example: James J. Fawcett and Paul Torremans, *Intellectual Property and Private International Law* (Calerndon Press, Oxford 1998) (hereafter referred to as Fawcett and Torremans, 1998); Phillip Michael Johnson, 'Private International law, intellectual Property and the Internet' (DPhil thesis, Queen Mary, University of London 2005) (hereafter referred to as Johnson, DPhil thesis, 2005) ; Mireille M.M. Van Eechoud, *Choice of law in copyright and related rights: Alternatives to the lex protectionis* (Kluwer Law International, The Hague 2003) (hereafter referred to as Eechoud, 2003); Rita Matulionyte, *Law applicable to copyright: A comparison of the ALI and CLIP Proposals* (Edward Elgar Publishing limited, Cheltenham 2011) (hereafter referred to as Matulionyte, *a comparison of the ALI and CLIP*, 2011) ; Rita Matulionyte, 'The law applicable to online copyright infringements in the ALI and CLIP Proposals: a rebalance of interests needed?' <http://www.jipitec.eu/issues/jipitec-2-1-2011/2961/JIPITEC_Matulionite.pdf> last accessed 18 Sep 2012 (hereafter referred to as Matulionyte, *The law applicable to online copyright*, 2011).

However, suggestions and proposed solutions concerning the applicable law to copyright have usually assumed application of these rules to copyright in general i.e. including moral rights as an integral element to copyright. Studies have rarely given much discussion on the position of moral rights as an independent set of rights from copyright from the perspective of conflict-of-laws.

It is important to note that moral rights are subject to choice-of-law rules that were not drafted with moral rights in mind. As a result, the applicable law to a cross-border moral right dispute will not necessarily be the law with the strongest connection to the legal issue at question. In addition, the currently applicable choice-of-law rules do not provide sufficient guidance with regard to the law to be applied to authorship or the law to be applied to determine the validity of waiver of moral rights. This comes as no surprise since these rules were not drafted with moral rights in mind at the first place.

In this context, there is a need to examine the particular position of moral rights in conflict-of-laws from another perspective. Recognition of moral rights as rights protecting the personality of the author in relation to his or her work raises a query regarding the intersection moral rights have with general personality rights in conflict-of-laws. This is of particular significance especially with regard to the recent EU proposal to include general personality rights in the Rome II Regulation.

B. Goals

There are two main goals for this research. The first is to illustrate the inaccuracy of subjecting moral rights to the same choice-of-law rules applicable to copyright by examining problems associated with such application. The second is to search for alternative, more suitable, choice-of-law rules that take the particular nature of cross-border moral rights disputes into consideration.

Problems and difficulties associated with the application of *lex loci protectionis* cannot be overlooked. Therefore, the search for alternative rules or solutions must take into account several important factors including the content of moral

rights protection, the centre of gravity in cross-border moral rights disputes, the theories and objectives of choice-of-law, and the relationship between substantive law and choice-of-law.

Examination of these factors over the course of this thesis is aimed at proposing a set of specifically designed rules to be applied to cross-border moral rights disputes.

C. Scope and limitation

In general, the research topic covers the intersection between Intellectual Property (IP) and Private International Law (PIL). In this regard, examination of relevant thesis issues will only be limited to certain topics and will not address either subject matter in whole since to do so would require two separate studies.

Therefore, this study will only address rules of conflict-of-laws². Reference to other PIL rules³ will be limited to the necessity and relevance of these rules to the issue at question.

The question of applicable law will be limited to moral rights. The use of the term 'moral rights' in this thesis is to be understood as those rights protecting the non-economic interests of both authors and performers, the term has nothing to do with 'morality'. The two internationally recognized moral rights (the attribution and integrity rights) will be the primary focus of this research as recognition of these two rights represents the minimum international requirement. As for authors' economic rights in the context of conflict-of-laws, these issues will be examined up to the extent of their relevance to the primary question of this research.

² In this thesis, conflict-of-laws and choice-of-law are used interchangeably. Both terms refer to applicable procedural rules designed to determine the applicable law in a cross-border dispute.

³ Jurisdiction and recognition and enforcement of foreign judgments.

Analysis of the applicable laws to moral rights will cover moral rights in contractual obligations as well as moral rights in non-contractual obligations (infringement). The study intends to cover infringement in traditional scenarios and in online (ubiquitous infringement) scenarios.

The geographical scope of this research, is by no means intended, nor able, to cover all relevant issues related to the primary question of moral rights in conflict-of-laws. Nevertheless, the complexity of the subject requires addressing the research question from a comparative point of view. Therefore, the thesis will cover the related international and regional instruments. This includes the Berne Convention (BC), the Rome I and II Regulations and the CLIP and ALI Principles. Examination of these Principles is affiliated with their significant influential role.

In addition to that, as there is no EU instrument on harmonization of moral rights or general personality rights, the traditional comparison between common and civil law traditions is required. In this respect, examples will be outlined from French and English legal systems as examples for both legal traditions. Examples from other jurisdictions like the US and Germany will be used occasionally when relevant. Furthermore, as this writer is sponsored by the University of Bahrain, reference to the Bahraini legal system – as an example for the civil law tradition in the Arab States- will be provided in the footnotes whenever possible.

D. Methodology and structure

Over the course of this thesis, evaluation and analysis regarding the suitability of the currently applicable choice-of-law rules to moral rights will be based on the 'allocation method' as this is the adopted method in Europe and most countries in the world. The purpose of this method is to first allocate the 'seat' in the legal relationship and accordingly point to the applicable law which should have the strongest connection with the 'centre of gravity' of the legal relationship.

The thesis is divided into 4 parts; the first being this Introduction. Part 2 covers the status quo through examining the applicable law to author's moral rights in relation to copyright both in contractual and non-contractual obligations including the question of initial ownership and authorship. The aim of Part 2 is to highlight whatever difficulties and problems associated with the currently applicable rules.

Following the identification of these problems, Part 3 examines alternative perspectives to copyright. It investigates the possibility of detaching moral rights from copyright in conflict-of-laws. There are two main reasons behind the idea of 'detachment'. The first is the strong common ground that moral rights share with general personality rights, and the second is the uncertain judicial attitude towards moral rights in cross-border disputes where it seems that courts take the matter beyond the scope of copyright. Accordingly, Part 3 starts with identifying the complications associated with having moral rights as part of copyright in conflict-of-laws. The investigation is then carried out from this point onwards.

Part 4 introduces the writer's new proposal. It starts with preliminary factors including theories and objectives of choice-of-law and the relationship of choice-of-law with substantive law. It then examines the shared elements between moral rights and general personality rights in conflict-of-laws. Finally, it explains the writer's 'new proposal' in the light of the recent EU proposal to include general personality rights in the scope of the Rome II Regulation.

Part 2

Status Quo: Examining the Applicable Law to Moral Rights in Relation to Copyright

Today, the economical and moral interests of copyright holders are at risk. The new digital age⁴ facilitated copying at a low cost. It further provided the 'copier' with an endless list of possibilities and options from choosing the quality of the copy to making alterations to the original work, and much more⁵. The internet, as a revolutionary invention, has increased the potentiality of copyright infringement. The border-less nature of the internet⁶ has increased the likelihood of encountering international elements in copyright cases.

As a consequence, copyright and Private International Law (PIL)⁷ had to intersect⁸.

⁴ For more details on types of technological challenges facing moral rights see Mira T. Sundara Rajan, 'Moral rights in the digital age: New possibilities for the democratization of culture' International Review of Law Computers & Technology, volume 16 No. 2 (2002) available online at <<http://ssrn.com/abstract=1808306>> p 189 last accessed 4 Sep 2012 (hereafter referred to as Rajan, 2002).

⁵ Paul Torremans, 'Moral rights in the digital age' in Irini A. Stamatoudi and Paul L.C. Torremans (eds), *Copyright in the new digital environment: the need to redesign copyright* (Sweet & Maxwell, London 2000) 99 (hereafter referred to as Torremans, 2000) .

⁶ The internet has been described as borderless in nature, geographically independent, portable, widely used, one to many...etc. for a detailed list and discussion on the internet's characteristics see Dan Jerker B. Svantesson, *Private international law and the internet* (Kluwer Law International, The Netherlands 2007) 29-44 (hereafter referred to as Svantesson, 2007) .

⁷ The two most common names for the subject are Private International Law and Conflict-of-laws. Both titles are commonly used throughout the world to refer to the same topic, however, several objections were put against both titles see for example Lawrence Collins (ed), *Dicey, Morris and Collins on The conflict of laws* (14th edn Sweet & Maxwell, London 2006) 36 (hereafter referred to as Collins, 2006). In this thesis the term conflict-of-laws will only be used to reflect the narrow sense of the term, meaning to refer to the situation where several conflicted laws are nominated to be applied to a particular case (choice-of-law).

⁸ Historically, Intellectual Property disputes were domestic in nature. Cross – border disputes were related to contracts and torts like personal injuries suffered abroad, thus in the later cases courts were faced with questions of PIL but not in relation to Intellectual Property. Today, the situation became very different with the emergence of the internet and new forms of technology

This Part is intended to examine the status quo for the applicable choice-of-law rules to moral rights as an element of copyright. To answer the first part of the research question: 'Are the currently applicable choice-of-law rules to copyright designed with author's moral rights in mind?' One must thoroughly examine the present legal position of moral rights as an element of copyright in conflict-of-laws.

Therefore, this Part is divided into the following chapters:

Chapter I: Introduction (where the primary focus is on the transfer of moral rights from national to international protection).

Chapter II: Examination of moral rights in contractual obligations in conflict-of-laws.

Chapter III: Examination of choice-of-law rules governing moral rights in cross-border torts including the question of authorship

Chapter IV: Evaluation and conclusion for Part 2.

see Richard Garnett, 'An overview of choice of law, Jurisdiction and foreign judgments enforcement in IP disputes' (2007) Melbourne Law school - Legal Studies Research Paper No. 205 <<http://ssrn.com/abstract=958854>> last accessed 2 Aug 2012, pp 2-3 (hereafter referred to as Garnett, 2007).

Chapter I

Introduction: The development of moral rights' protection from national to international in relation to conflict-of-laws

A. Overview of moral rights

'Moral rights' are rights that protect the non-economic interests of the author. These rights intend to protect the personality of the author in relation to his work based on the author's ownership to his *inner personality*⁹.

As moral rights protect the non-economical aspect of an author's interest, they are considered as independent from economic rights, and

'Every attempt to justify moral rights solely on economic grounds is deemed flawed because the essence of moral rights—the rights that represent the inner process of the creative act and its final embodiment in expressive enterprises—is distinct from the economic aspirations of the creative act'¹⁰.

The theoretical basis of moral rights was tackled from different approaches. However, the philosophical approach developed by Kant, was used as the basis of the whole theory of moral rights¹¹. Therefore, moral rights were first based on the naturalist approach which viewed author's work as inseparable part of his

⁹ Lior Zemer, 'Response: The dual message of moral rights' 90 (2012) Texas Law Review *See Also* 125 -143 available online <<http://www.texasrev.com/seealso/vol/90/responses/zemer>> last accessed 30 Sep 2012, p 135 (hereafter referred to as Zemer, 2012).

¹⁰ Zemer, 2012, p 132, nevertheless, moral rights do have economic consequences discussed further in footnote 398.

¹¹ For an interesting and brief commentary on the theoretical justification of moral rights see Rocherieux Julien, 'The future of moral rights' [2002] IP Dissertation available at <www.kent.ac.uk> last accessed 3 Oct 2012, pp 4-5 (hereafter referred to as Julien, 2002).

personality rooted in the natural law¹². At a later stage, the personalist ideas had more powerful influence and were responsible for the development of moral rights through case law¹³. Besides influence of the personalist ideas, French courts significantly contributed to the development of those rights in the 2nd half of the 19th century and first half of the 20th century¹⁴, to the extent that French case law is seen as responsible for the emergence of these right¹⁵.

It is agreed that theoretical origins and major developments of moral rights took place in Continental Europe (namely France and Germany), at the same time, the *interests* protected under author's moral rights were also recognized in England. The Statute of Anne¹⁶ – the foundation of the English and American copyright system¹⁷ recognized John Lock's concepts of "natural rights" and "just reward" to authors¹⁸. English case law illustrated how English law recognized the right of

¹² And accordingly, only physical persons are to be considered as creators of the work. Gillian Davies, *Copyright and the public interest* (2nd edn. Sweet & Maxwell, London 2002) 140-150 (hereafter referred to as Davies, 2002).

¹³ The concept of personalist author's rights was the result of change in the situation in the 2nd half of the 19th century where focus started to be on the aesthetic character of works in France. This had huge influence on the theory behind copyright in France along with the concept of personalist author's rights; Davies, 2002, pp 169-177.

¹⁴ For more details see Davies, 2002, pp 140-150.

¹⁵ Rigamonti, 2006, Harv. Int'l L.J. at p 356 also see Dane S. Ciolino, 'Moral rights and real obligations: a property – law framework for the protection of author's moral rights' 69 (1994) Tul. L. Rev. 937 (hereafter referred to as Ciolino, 1994).

¹⁶ Statute of Anne 1710

¹⁷ R.R. Bowker 1912, *Copyright its history and its law* (2nd edn William S Hein & Co. Inc. Buffalo, New York, 2002) 24 (hereafter referred to as Bowker, 2002).

¹⁸ The Statute also recognized the role of copyright protection as means to encourage creativity and benefit the society, Christopher May and Susan K. Sell, *Intellectual Property Rights: A critical History* (Lynne Rienner Publishers Inc, London 2006) 93 (hereafter referred to as May and Sell, 2006).

integrity through protection of the right of personality under common law rights¹⁹ such as passing off, defamation and slander of goods²⁰. Thus, the essence of moral rights as it is understood today was –as common law lawyers argue- protected under common law. Nevertheless, moral rights did not stand a chance in making the same successful story in Britain as they did in Continental Europe. This was mainly attributed to the legal situation in Britain which was based on the golden age of contractual freedom²¹.

Despite these historical differences between civil and common law traditions, moral rights succeeded in gaining more international recognition and importance²². The result was an international commitment towards providing moral rights with minimum level of protection, namely the attribution and integrity rights²³. Interestingly, acceptance of moral rights is wider than international agreements on IP rights that have actually been included on the agenda of internationalization, an example of that is certain kinds of patent rights²⁴. Moreover moral rights were recognized in art (27/2) of the Universal Declaration of Human Rights (UDHR).

¹⁹ Robyn Durie, ' Moral rights and the English business community' [1991] Ent. L. R.42 (hereafter referred to as Durie, 1991).

²⁰ Rupert Sprawson, 'Moral rights in the 21st Century: a case for bankruptcy?' [2006] Ent. L. R. 58 – 64 (hereafter referred to as Sprawson, 2006).

²¹ Hence, conflicts between interests had to be decided in accordance with business efficacy. Nevertheless, the golden age of contractual freedom did not stand in the way of applying torts of defamation and passing off accordingly, W. Cornish & D. Llewelyn, *Intellectual Property: Patents, copyright, trade marks and allied rights* (6th edn Sweet & Maxwell, London 2007) 375-402 (hereafter referred to as Cornish and Llewelyn, 2007).

²² Moral rights protection in international law will be discussed directly below.

²³ As set in art 6*bis* Berne Convention.

²⁴ For more details see Mira T. Sundara Rajan, 'Moral rights and copyright harmonization: prospects for an "International Moral right"?' 17th BILETA annual conference, April 5th-6th 2002, Amsterdam. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809619> last accessed 10 Oct 2012, p 4.

Therefore, moral rights were clearly introduced into the UK in chapter IV of the CDPA 1988. The CDPA 1988 recognizes moral rights as being separate from economic rights. These rights are not property or personality rights, nor are they considered natural or common rights, rather, those are statutory rights the breach of which is breach of statutory duty²⁵. The Act recognises 4 moral rights all of which are non-transferable yet can be waived²⁶:

The first moral right is the attribution right or the right to be identified as author or director of a copyright film. This right however, cannot be exercised unless it has been asserted²⁷. Therefore, one can say that the paternity right is not automatically granted to authors and directors under CDPA 1988²⁸. Exceptions to the right of attribution are listed in Section 79 of the CDPA1988. Exempted works reflect the strong lobbying power enjoyed by newspaper and publishing industries²⁹. The attribution right also does not apply to computer programs,

²⁵ CDPA1988 – Sec 103(1).

²⁶ Moral rights under CDPA 1988- can be waived. Waiver can be specific or general and can be in relation to present and to future works, CDPA 1988 – Sec 87.

²⁷ Assertion can be done in two ways. Either by including a statement to be identified as an author when assigning the copyright in the work, or by a written instrument signed by the author or director. When it comes to artistic work there are two more ways in addition to the above mentioned ways, if the artist is identified on the original, copy, frame or any other attachment of the work, and when including an identification clause in any licence agreement which permits making copies of the work, see Sec 78 CDPA1988.

²⁸ When the bill was discussed in the House of Lords, Lord Hutchinson stated that: "added right is given to the artist and the author but then it is immediately taken away in the sense of making it extremely difficult for him to enjoy his right at all". See Julian Turton and Martine Allen, *Moral rights are now protected*, published in Moral rights reports presented at the meeting of the International Association of Entertainment Lawyers MIDEM - Cees Van Rij (editor) Hubert Best (Survey editor) (MAKLU publishers, Cannes 1995) 161 (hereafter referred to as Turton and Allen, 1995).

²⁹ L. Bently and B. Sherman, *Intellectual Property Law* (2nd edn, Oxford university press, Oxford 2004) 235 (hereafter referred to as Bently and Sherman, 2004).

computer - generated works and the design of a typeface, yet there is no logical justification for those exceptions³⁰.

The second moral right is the integrity right or as named in the CDPA1988 'Right to object to derogatory treatment of work'. The right entitles the author of literary, dramatic, musical, artistic work or the director (of a film) to object to any derogatory treatment for his work. There is no assertion requirement like the case with the right of attribution³¹.

The third moral right is the right to object to false attribution. This right is considered to be the oldest statutory moral right in the UK³² and is the converse of the right to be identified as the author³³. The right can be exercised by any person falsely attributed as the author of a work. It does not depend on the copyright in the work and thus not considered by some scholars to count for an actual moral right³⁴. This right is not recognized as a moral right neither under BC nor under other legal systems³⁵.

³⁰ Bently and Sherman, 2004, p 235.

³¹ Hector McQueen, Charlotte Waelde & Graeme Laurie, *Contemporary Intellectual Property Law and Policy* (Oxford University Press, Oxford 2008) 102-106 (hereafter referred to as McQueen, Waelde and Laurie, 2008).

³² Bently and Sherman, 2008, pp 239-241.

³³ Cornish and Llewelyn, 2007, pp 497-498.

³⁴ Irini A. Stamatoudi, 'Moral rights of authors in England: the missing emphasis on the role of creators' [1997] I.P.Q. 491 (hereafter referred to as Stamatoudi, 1997).

³⁵ McQueen, Waelde and Laurie, 2008, p 98. Dr. Osama Ahmed Bader says that if we distinguish between the author and his intellectual work and imagined that the author's name was falsely attributed to a work which he did *not* create, then moral rights are not violated because -according to his argument- the attack here is towards the author's reputation and has nothing to do with the work. However, if the author's name was not mentioned on *his own* work, the infringement here is in relation to author's moral rights, Osama Ahmed Bader, *some of the problems concerning dealing with author's work on the internet* (2nd edn, Dar-Alnahda Alrabia, Cairo 2002) 22 (hereafter referred to as Bader, 2002).

The fourth and final moral right is the right to privacy of certain photographs and films. This right – like the right to object to false attribution- is not recognized as moral right under BC or other legal systems³⁶. It simply entitles a person who commissioned the taking of photographs or film for private purposes to object to publication or communication of the work in question to the public. The right to privacy applies to the whole or substantial part of the photograph or film. It subsists as long as the copyright subsist in the work.

On the other hand, France, as an example of civil law tradition³⁷, is generally considered 'the birth place of moral rights'. The French legal system was familiar with the notion of moral rights before the introduction of the BC³⁸. France has adopted the view that what was presented in article 6*bis* is merely a minimalist

³⁶ McQueen, Waelde and Laurie, 2008, p 98.

³⁷ All Arab countries (except for Sudan) are considered to be part of the civil law tradition. The first statute for the protection of author's rights in the Arab states was the Othmanian law for authorship in 1910. This law remained in force in many Arab states until fairly recently when it was replaced with modern laws; Morocco was the first country to replace this law in 1916 followed by Lebanon in 1924. As for the situation in the other Arab states, authors were protected in miscellaneous provisions within civil and criminal law, note that the Egyptian law of 1954 was the first Arabic statute issued after independence of Arab States see Mohamed Hussam Lutfi, *fundamental principles of author's right: courts' decisions in the Arab states* (WIPO Publication, 2002) 5-6 (hereafter referred to as Lutfi M, 2002) and Abdulla Mabrouk Alnajar, *Author's moral right in Islamic and comparative law* (Dar Almareekh for publishing, Riyadh 2000) 30-34 (hereafter referred to as Alnajar, 2000). The shortage in the protection provided for authors in the Arabic statutes was obvious and there was a serious need for an *independent* author's rights law. As a result, author's rights laws started to emerge starting with Lebanon 1946, Egypt 1954, Tunis 1966, Libya 1968, Morocco 1970, Iraq 1973, Sudan 1974, Saudi Arabia 1990, Alnajar, 2000, pp 30-34.

³⁸ For more details see: Elizabeth Adeney, *The moral rights of authors and performers: an International and Comparative analysis*, (Oxford University Press, 2006) 165-168 (hereafter referred to as Adeney, 2006).

approach to moral rights and that interpretation should not be confined to this concept³⁹.

The association of moral rights with human rights in UDHR supported the French approach towards moral rights as fundamental personal rights. Thus, moral rights in the French legal system are enjoyed by all authors regardless of the value of the work⁴⁰. These rights are inalienable and perpetual except for the right of revocation which ends after the author's death⁴¹.

French law recognizes the following 5 moral rights⁴²:

³⁹ Adolf Dietz, *Legal principles of moral right (civil law) General report*, published in *Le droit moral de l'auteur - The moral right of the author*, (publication of ALAI : Association litteraire et artistique internationale Congress of Antwerp 19-24 Sep 1993) 55-56 (hereafter referred to as Dietz, 1993).

⁴⁰ Eric Lauvaux, *Moral rights as an obstacle to the exploitation of musical works*, published in *Moral rights reports presented at the meeting of the International Association of Entertainment Lawyers MIDEM - Cees Van Rij (editor) Hubert Best (Survey editor) Chris Wilde (Translator) (MAKLU publishers, Cannes 1995) 72-73 (hereafter referred to as Lauvaux, 1995).*

⁴¹ Dietz, 1993, pp. 67-70, the Bahraini copyright law titled Act no 22 / 2006 concerning the Protection of Author's right and Neighboring Rights (hereinafter Bahraini Author's Right Act) is similar to the French *droit d'auteur* in that both Acts have authors as the central and primary focus. The long duration of protection to moral rights is justified on the grounds that these rights protect the personality related interest of the author on one hand, and the interest of the community on the other hand. See Roger Van den Bergh, 'the role and social justification of copyright: law and economic approach' [1998] IPQ 31 (hereafter referred to as Bergh, 1998).

⁴² See Stamatoudi, 1997, I.P.Q. 478; note that, France regards its moral rights provisions as an important tool to protecting its national identity, Dorothee Thum, 'Who decides on the colors of films on the internet? Drafting of choice of law rules for the determination of initial ownership of film works vis-à-vis global acts of exploitation on the Internet' in Josef Drexler and Annette Kur (eds), *International Property and Private International Law – Heading for the Future* (Hart Publishing, Oregon 2005) 272 (hereafter referred to as Thum, 2005).

The first is the right of attribution. Justification of this right was made clear by Desbois comments on the *travaux préparatoires* of the statute of 1895 which specifically dealt with this issue. He noted that the objective was to assure the honesty of the art market rather than to protect the personal interest of the artist⁴³. The author has the right to have his academic qualifications and title mentioned as well as his right to be titled as the author rather than some other participant in the work⁴⁴.

The second is the right of integrity. The right is similar in its scope to the integrity right as recognized in the BC⁴⁵. Pouillet commented on this right in 1879 as being a natural consequence of the right of attribution, as the author should be entitled to safeguard the accuracy of any creation attributed to his or her name. Hence, authors have the right to object to alterations of their works even if such alterations made the work better⁴⁶.

The third is the right of disclosure⁴⁷. It gives the author the right to decide whether to publish his work or not. In relation to commissioned works, the right still applies. However, if the author refuses to release -for the first publication- the work he was commissioned for, substantial damages will be paid for the person who commissioned the work⁴⁸. The French theory views this right as the most basic moral right of the author. The author's decision about when to reveal his work to the public is of a personal nature, it gives the author the right to

⁴³ Adeney, 2006, p 50.

⁴⁴ Adeney, 2006, p 180.

⁴⁵ Stamatoudi, 1997, I.P.Q. 478.

⁴⁶ Adeney, 2006, p 54. For more details see Nicolas Bouche, *Intellectual Property law in France* (Kluwer Law International, The Netherlands 2011) 80-82 (hereafter referred to as Bouche, 2011).

⁴⁷ The term disclosure is broader than the concept of publication. It can arise from the exhibition or public presentation of the works, Adeney, 2006, p 192.

⁴⁸ Lauvaux, 1995, pp 75-79.

decide how and when exactly should his work enter the commercial market⁴⁹. Bear in mind, that once the author has exercised his right of first disclosure, the right is exhausted⁵⁰.

The fourth right is the right of revocation or repentance. The right is seen as the other side of the right of divulgation as it entitles the author to withdraw his work from the market if he changes his mind. IP Code article L121.4 requires the author to compensate the transferee for all the expenses incurred including those for marketing the work, this usually prevent authors from exercising this right⁵¹. Authors of computer programs are not entitled to this right, the only way for an author of computer programs to put an end to its diffusion will be through

⁴⁹ Dietz, 1993, pp 57-60.

⁵⁰ Bouche, 2011, 78.

⁵¹ Lauvaux, 1995, pp 75-79. The right to withdraw the work from the market is subject to certain qualifications which made this right rarely litigated. Moreover, this right is naturally subject to the general rule 'abuse of right', and the abuse is assumed if the author exercise this right based on monetary concerns. Hence, the divulgation right became -as described by Professor Rigamonti- 'largely an example of symbolic legislation', Cyrill P. Rigamonti, 'Deconstructing Moral rights' (2006) 47 Harv. Int'l L.J. 363 (hereafter referred to as Rigamonti, 2006). One should also bear in mind that this right was not recognized by the Berne Convention, Peter K. Yu, 'Moral rights 2.0' in Christopher Heath and Anselm Kamperman Sanders (eds), *Landmark Intellectual Property Cases and Their Legacy: IEEM International Intellectual Property Conferences* (Kluwer Law International, The Netherlands 2011) 30 (hereafter referred to as K. Yu, 2011). The right to withdraw the work is not supported in England: in *Southey v Sherwood* (1817) 2 Mer 435 (Ch) in this case, the plaintiff Robert Southey composed a poem titled 'Wat Tyler' in 1794 which he sent to a bookseller with the intention to publish it. However, Mr. Southey had changed his mind about publishing the poem which had already passed to the defendant, the court *refused* to grant the plaintiff injunction to restrain publication, printing or selling of his poem. On the same point see David Vaver, 'Does intellectual property have personality?' Chapter 8 in Reinhard Zimmerman & Niall R Whitty (eds), *Rights of Personality in Scots law: A Comparative Perspective* (University of Dundee Press, 2009), 403-432 available at: <<http://ssrn.com/abstract=1879251>> last accessed 30 Sep 2012, p 7 (hereafter referred to as Vaver, 2009).

entering into a contract which could give him control over the work after the transfer of the economic rights⁵².

The fifth and final right is the right to access the work. The author can exercise this right to merely see and enjoy his work or to make reproduction⁵³.

B. Moral rights protection from national to international laws

As a result of the ever-increasing cross-border transactions, the position of moral rights as an element of copyright moved from national to transnational level. The shift in the position of copyright is mainly attributed to the mechanical printing invented in the 15th century⁵⁴. Books became part of cross-border transactions, which forced authors to take part in activities that were no longer confined to national borders.

Today, the concept of cross-border transactions has not changed. However, the digital revolutions together with the internet have reshaped 'how' it is done. The international nature of the market brought attention to the real need for an international understanding of moral rights. Authors began to face serious disadvantages and difficulties when their works were distorted or misattributed abroad. The result was an international concern leading to a constant pressure which in turn was responsible for the international development of these rights.

⁵² Adeney, 2006, p 196.

⁵³ However, this right is restricted, for example, authors should not cause nuisance to the owner of the work, Stamatoudi, 1997, I.P.Q. 499.

⁵⁴ The book industry developed rapidly and printers required legal protection against unauthorized copying of their books. The majority of commentators consider this to be the leading event to the emergence of copyright protection, generally see McQueen, Waelde and Laurie, 2008, pp 34-36; for detailed examination of the history of copyright see May and Sell, 2006.

ALAI Congress had very important role in developing moral rights internationally⁵⁵. In 1900, The Congress was working on a model law that proposed to protect moral rights. The protected rights under the proposition were: the right of attribution, the right to object to modifications of the work, and the right to object to public exhibition of the modified work. Those rights were to pass to authors' heirs or a specially designated trustee⁵⁶.

The BC 1886⁵⁷ is recognized as the most important international instrument establishing the notion of non-transferable moral rights⁵⁸. The early texts of the Convention did not contain moral right provisions. However, the 1928 Rome conference called for including provisions to ensure moral rights protection. The lobbying powers then were France, Poland, Italy, Romania and Belgium⁵⁹. The Convention had introduced moral rights in article 6*bis* which entitled authors to the right of attribution and integrity. Moreover, those rights, unlike economic rights, were not to be transferred⁶⁰. The article was drafted in broad terms to avoid causing any serious tension between common and civil law delegates and was finalized at the Rome Revision Conference⁶¹.

⁵⁵ Adeney, 2006, p 99.

⁵⁶ Adeney, 2006, pp 99-100.

⁵⁷ The Berne Convention for the Protection of Literary and Artistic Works (1886)

⁵⁸ McQueen, Waelde and Laurie, 2008, pp 97-98.

⁵⁹ Gerald Dworkin, *Moral rights in common law countries*, published in Moral rights reports presented at the meeting of the International Association of Entertainment Lawyers MIDEEM - Cees Van Rij (editor) Hubert Best (Survey editor) (MAKLU publishers, Cannes 1995) 38-42 (hereafter referred to as Dworkin, 1995) note that the efforts of the Italian delegation in Rome were behind introducing moral rights into the legislations of copyright countries – see Adeney, 2006, p 105.

⁶⁰ Berne Convention – Article 6*bis*.

⁶¹ Adeney, 2006, pp 112-114. Despite the fact that moral rights were well recognized under the Convention, the main focus of the Convention was on the economic rights of the author.

At a later stage, moral rights were associated with human rights on the international level. Art 27 (2) of UDHR ⁶² emphasized the perception of these rights as natural rights rather than property rights. The initial proposal was rejected by common law countries on the basis that copyright is not a human right matter, rather a legal one⁶³. However, the clause was finally accepted and moral rights were eventually associated with human rights, a result of the support granted by the delegations of the civil law countries⁶⁴. Article 27(2) of UDHR emphasizes the individualistic dimension of moral rights⁶⁵ and marked the triumph of the individualist concept⁶⁶.

The Brussels Conference for the revision of the Berne Convention (1948) took place within the period when the negotiations of the UDHR were taking place. However, the attitude of the common law delegates this time was dramatically different. The UK specifically, expressed its desire not to include any provision for moral rights since the common law viewed the Convention as an economic

⁶² UDHR (1948) does not have a binding force in a strict sense although it has a high moral authority. Hence, it is considered as an accepted standard of human rights today, Adolf Dietz, 'The artist's right of integrity under copyright law – a comparative approach' [1994] IIC 178 (hereafter referred to as Dietz, 1994).

⁶³ Adeney, 2006, p 133.

⁶⁴ Adeney, 2006, p 141.

⁶⁵ Whereas debates preceding the adoption of the Declaration highlighted its social dimension, Zemer, 2012, p 128.

⁶⁶ The concept was strongly maintained by France for the previous two decades ; Adeney, 2006, pp 133-134.

agreement⁶⁷. Yet, civil law view prevailed once again and the scope of article 6bis was expanded⁶⁸.

During the next period, the situation was shifted in favor of the common law tradition starting with the Stockholm Conference of the Berne Convention 1967. The UK expressed its concerns regarding the confusing nature of moral rights and how an alliance with the US could hinder the expansion of those rights. As a result, article 6bis was adopted in its final version.

The position of common law tradition was further strengthened in TRIPs. It was the first international instrument which clearly expressed the copyright dichotomy⁶⁹. The issue of moral rights was controversial in the US at that time. As a result of the US dominance on the negotiations, there was an explicit exclusion for members from the obligation under article 6bis of the Berne Convention⁷⁰. As some argue, the US had to exclude moral rights since it was not in compliance with BC and had those rights been incorporated into TRIPs, the US would have been subject to trade sanctions⁷¹.

⁶⁷ Adeney, 2006, p 133; Gillian Davis and Kevin Garnett, *Moral rights* (Sweet & Maxwell, London 2010) 48 (hereafter referred to as Davis and Garnett, 2010).

⁶⁸ The expansion was in relation to the second paragraph of article 6bis; the article was first accepted at the Rome revision conference in 1928, it read: “....(2) The determination of the conditions under which these rights shall be exercised is reserved for the national legislation of the countries of the union. The means of redress for safeguarding these rights shall be regulated by the legislation of the country where protection is claimed”, Adeney, 2006, p 114.

⁶⁹ i.e. copyright protects expressions not mere idea, Cornish and Llewelyn, 2007, p 394.

⁷⁰ TRIPs – article 9(1) this was an obvious indication that this agreement focused only on the economic rights, May and Sell, 2006, p 165

⁷¹ Adeney, 2006, p 151.

C. Copyright and international treaties – exploring 'choice-of-law' issues:

As copyright became more involved in cross-border disputes, it was no longer possible to ignore questions of PIL. The intersection between the two fields became an evident reality rather than a theoretical possibility.

1. Brief note on characterization:

Characterization is '... the allocation of the question raised by the factual situation before the court to its correct legal category, and its object is to reveal the relevant rule for the choice of law'.⁷² It is a decisive primary step in conflict-of-laws⁷³, a fundamental process that controls the final outcome of the conflict-of-laws⁷⁴.

Characterization is also known as 'qualification'⁷⁵, 'classification' and 'determination'⁷⁶. Regardless of what term one decides to use, classification according to Graveson is:

⁷² Anthony J. Bland, 'Classification re-classified' 6 (1957) Int'l & Comp. L. Q. 13 (hereafter referred to as Bland, 1957).

⁷³ R. H. Graveson, *Conflict of laws: Private International Law* (7th edn, Sweet & Maxwell, London 1974) 43 (hereafter referred to as Graveson, 1974).

⁷⁴ Veronique Allarousse, 'A comparative approach to the conflict of characterization in private international law' 23 (1991) Case W. Res. J. Int'l L. p. 479 (hereafter referred to as Allarousse, 1991). Characterization could turn contract disputes to torts, it also could turn substantive law to procedural, hence, resulting in application of the law of the forum, see Lea Brilmayer & Raechel Anglin, 'Choice of law theory and the metaphysics of stand-alone trigger' 95 (2010) Iowa Law Review, p 1135 (hereafter referred to as Brilmayer and Anglin, 2010).

⁷⁵ 'Qualification' is the commonly used term in Continental Europe ever since it's been dealt with by Bartin who was unaware that the topic was discussed and published by Franz Kahn few years before him, Ernest G. Lorenzen, 'The qualification, classification, or characterization

... a normal and necessary process of human thought. We identify and arrange facts, knowledge and experience into groups and classes in order to understand them better, a process which operates in law no less and no more than in other fields of knowledge⁷⁷

Hence, characterization is not peculiar to conflict-of-laws. The same have to be done with rules of torts, contracts or any other area of law⁷⁸. Nevertheless an important difference is that on the domestic level the subject matter of domestic rules is facts, the question is whether these facts fall within the rule in question. In choice-of-law, the subject matter is not facts but rules of domestic law and whether the domestic rule in question falls within the scope of the choice-of-law rule⁷⁹.

What remains certain in relation to characterization is the fact that it is one of the richest topics in conflict-of-laws. Its goal, put in simple words, is to analyse the components of the legal relationship to decide under which category it falls: torts, contracts, marriage, divorce, legal capacity ...etc.

problem in the conflict of laws' in Richard Fentiman (ed), *Conflict of Laws* (Dartmouth Publishing Co Ltd., England 1996) 743 (hereafter referred to as Lorenzen, 1996).

⁷⁶ Spiro prefers to call this process 'determination' as he explains that this term "... *puts the problem in a better perspective by pointing to a process which always takes place whether there is a foreign element or not.*" He also believes that Khan and Batin were not the first to consider the issue of characterization. Erwin Spiro, *Conflict of laws* (JUTA & Co. Ltd, Cape Town 1973) 57 (hereafter referred to as Spiro, 1973).

⁷⁷ Graveson, 1974, p 43.

⁷⁸ Allarousse, 1991, Case W. Res. J. Int'l L. 479.

⁷⁹ C.M.V. Clarkson & Jonathan Hill, *The Conflict of Laws* (3rd edn, Oxford University Press, New York 2006) 463. (hereafter referred to as Clarkson and Hill, 2006). It is worth mentioning that characterization may arise even where the relevant legal systems have identical choice-of-law rules because each legal system may interpret the identical choice-of-law rule differently, Christopher Forsyth, 'Characterization revisited: an essay in the theory and practice of the English conflict of laws' [1998] LQR 158 (hereafter referred to as Forsyth, 1998).

Therefore, courts will carry out their usual characterization procedure even if moral rights were the disputed subject matter in cross-border situation. For example, (John) an English music writer habitually resident in France brings a claim before English courts against (Julia) a French musician who is habitually resident in England, claiming that Julia has published his work in London and Paris without attribution to him as the composer of the piece. The court in this example must characterize Julia's actions to determine whether they fall under the category of tort or contract. Once Julia's actions are classified as tort, choice-of-law rules applicable to non-contractual obligations will be applied (in this particular scenario, rules of Rome II Regulation).

And thus, the issue of characterization of moral rights in conflict-of-laws is not seriously problematic⁸⁰. The process will be limited to classifying the issue as either tort or contract, as there is no doubt that divorce, marriage and status are by default excluded categories. Yet, the real characterization problem is that concerned with the *nature* of moral rights. The essential question is whether moral rights are characterized as part of general personality rights, or copyright or falls somewhere in between. For choice-of-law purposes, deciding on the nature of these rights is significant as it determines the suitability of connecting factors and eventually the accurateness of the selected law.

At this chapter, it suffices to say that there is no universal agreement on how the nature of moral rights should be characterized. However, this particular issue is analysed and researched in Parts 3 and 4 of this thesis.

⁸⁰ The majority of commentators believe that characterization is a highly important process. However, some commentators argue that its importance is overestimated. J. Morse in a leading article stated that what is called as characterization questions are in essence generally choice of law questions, Allorousse, 1991, p 508. Moreover, according to Lederman's analysis, classification can never reveal the "essence" of a rule of law; as indicated in the writings of Roscoe Pound, classification is not an end: "*Legal precepts are classified in order to make the material of the legal system effective for the ends of law*". Accordingly, supporters of this view conclude that considering classification as one of the most difficult problems in the conflict of laws is simply a myth because in every instance, classification is synonymous with 'selection of the proper law', Bland, 1957, Int'l & Comp. L. Q. 10, 12, 27.

2. Choice-of-law rules in the related international instruments:

Commentators had to refer to the related international instruments to decide whether a choice-of-law rule is given in relation to copyright or not.

The first question is whether there is a real need to have different rules for copyright at the first place or not. Several scholars found it problematic to depart from norms used for other IP rights. They argued that the subject matter for different IP regimes is converging and claims are normally based on two or more IP rights. In addition, following different approaches in relation to applicable law may reduce certainty and effect investments⁸¹. On the other hand, others understood IP rights to be different in important respects, most notably with regard to copyright which is acquired without registration⁸². Thus, the latter group was in favour of applying specifically designed choice-of-law rules to copyright.

Number of international instruments need to be examined to determine whether there are choice-of-law rules applicable to copyright or not. The most important one to this discussion is the BC. The Convention laid down the widely acknowledged principle of *lex protectionis*.

⁸¹ Graeme B. Dinwoodie, 'Conflicts and International Copyright Litigation: The Role of International Norms' in Jurgen basedow, Josef Drexl, Annette Kur & Alex Metzger (eds), *Intellectual Property in the Conflict of laws* (Max Planck Institute, Germany 2005) 196-197 (hereafter referred to as Dinwoodie, 2005).

⁸² In support of this view Dinwoodie, 2005, pp 196-197, whereas Gottschalk is not in favor of dividing IP rights into registered and unregistered in relation to questions of PIL see Eckart Gottschalk, 'The law applicable to intellectual property rights: is the *lex loci protectionis* a pertinent choice –of-law approach?' in Eckart Gottschalk, Ralf Michaels, Giesela Ruhl and Jan Von Hein (eds), *Conflict of laws in a globalized world* (Cambridge University Press, 2007) 208 (hereafter referred to as Gottschalk, 2007). In any case, one should keep in mind that the distinction is not too clear now with the existence of unregistered trademark rights throughout the EU and unregistered design rights.

i. Berne Convention – Art 5

The BC was a departure from discrimination against foreign authors that dominated the pre 1886 copyright relations. It was a step to harmonize author's rights on the international scale⁸³.

Art 3 BC points to the connecting factors that need to be considered when determining the eligibility of the work at hands. It first requires a work to come within its scope to qualify for its protection. Protection is granted to all authors who are nationals of one of the Member States of the Berne Union. Furthermore, protection is also granted to an author who is not a national of a Member State but is habitually resident in a Member State. Second connecting factor is first publication of the work in a Member State; no further requirement related to nationality of the author is mentioned⁸⁴.

However, what is essentially related to the present discussion is article 5 BC. Nevertheless, interpretation of this article was problematic and controversial.

Art 5(1) BC introduces the principle of national treatment to authors. Mr. Fentiman argues that the national treatment rule has nothing to do with PIL questions⁸⁵. He understands the rule as exclusion to the *lex originis* i.e. the law

⁸³ Dinwoodie, 2005, p 205

⁸⁴ As for which connecting factor prevails: 1- If a work has been published in a Member State. 2- If not published or published but not in a Member State then the nationality or habitual residence of the author; however, the two narrow connecting factors in art (4) prevail over this one if their requirements are met. The first publication link is easier to be established and provides legal certainty plus it facilitates exploitation of the work. See Fawcett and Torremans, 1998, pp 464 - 465.

⁸⁵ Supporting this view Nerina Boschiero: Nerina Boschiero, 'Intellectual property in the light of the European Conflict of laws' <<http://www.ialsnet.org/meetings/business/BoschieroNerina-Italy.pdf>> last accessed 3 Sep 2012 at no. 5 (hereafter referred to as Boschiero). There was a view to apply national treatment to jurisdiction, naturally this has been rejected. Cornish and

of the protecting country is to be applied to foreign right holders as much as to national ones⁸⁶. Two main disadvantages of *lex originis* motivated attempts to drift away from its application. The first was the impracticality of *lex originis* rule as it requires the courts of one country to apply the law of another country according to where the work originated from. The second was the discriminatory effects resulting from its application. The foreign right holder will have stronger or weaker protection than that provided to the national right holder⁸⁷.

Others think of the national treatment principle as a choice-of-law rule in limited sense⁸⁸. It requires a country to apply the same law to works of foreign origins as it does to works of its own nationals⁸⁹. Dr Van Eechoud agrees with the interpretation of this principle but argues that it should not be considered a choice-of-law rule, rather it is a non – discrimination rule⁹⁰. But does non – discrimination mean that only substantial rules apply to local and foreign authors or does it also mean applying local choice-of-law rules to foreign authors? Applying choice-of-law rules to foreign authors means that the quality of treatment will depend on what the local choice-of-law rule is. For example: if the local choice-of-law rule states that the law of the country of infringement applies, then if infringement occurred in country (x) which is not the forum, the

others believe that the national treatment principle should only be relevant to the applicable law, cited in Johnson, DPhil thesis, 2005, pp 256-258; also see Fawcett and Torremans, 1998, pp 12-13.

⁸⁶ Richard Fentiman, 'Choice of law and intellectual property' in Josef Drexler and Annette Kur (eds), *International Property and Private International Law – Heading for the Future* (Hart Publishing, Oregon 2005) 134 (hereafter referred to as Fentiman, 2005); also mentioned in Johnson, DPhil thesis, 2005, p 325.

⁸⁷ Fentiman, 2005, p 135.

⁸⁸ '... For the most part, commentators agree on a choice-of-law understanding of the national treatment principle, but they adopt diverging views on the final solution as to which law this principle requires the application of.' Boschiero, no 5.

⁸⁹ Goldstein's view cited in Eechoud, 2003, p 107.

⁹⁰ Eechoud, 2003, pp 109-110.

law of country (x) will apply whether infringement was related to local or foreign authors. However, if the choice-of-law rule of the forum states that the law of the country of origin applies, then local law determines infringement of local works and foreign law determines infringement of foreign works⁹¹. The result will be considerable unpredictability and denial of national treatment⁹².

Art 5(2) BC is subject to intense discussion with regard to the question of applicable law to copyright. It states that '... the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed'. The crucial term 'country where protection is claimed' is left undefined in the convention and no assistance can be found in the preparatory materials⁹³. Obviously the drafters of the convention assumed that the term will be understood by all those who read it. The term was introduced as a suggestion from the German administration as an attempt to remove emphasis from the law of the country of origin, no questions were raised in relation to the meaning of the newly introduced term⁹⁴.

To identify 'where protection is claimed' commentators adopted different opinions. Some argued that a literal interpretation refers to *lex fori* (the law of the forum) that is where the author is involved in legal proceedings⁹⁵. Those in

⁹¹ Sam Ricketson and Jane Ginsburg, *International copyright and neighbouring rights – the Berne Convention and beyond* (Volume I, 2nd edn Oxford university press, Oxford 2006) 1298 (hereafter referred to as Ricketson and Ginsburg, 2006).

⁹² Ricketson and Ginsburg, 2006, p 1298.

⁹³ Adeney, 2006, p 632.

⁹⁴ Adeney, 2006, p 633.

⁹⁵ Those in support of this view are mentioned in Fawcett and Torremans, 1998, pp 467-468.

favour of *lex fori* interpretation support their view by arguing that ‘means of redress’ is more consistent with *lex fori*, as the normal procedure is to have the law of the forum governing questions of which actions are available in the case of infringement and other procedural issues⁹⁶. However, acceptance of this view proved to be unlikely as article 5 talks about the substantive level of protection for those – already- qualifying works⁹⁷. Bear in mind however, that the forum is most probably where the defendant is domiciled or has assets, providing the best redress possible. It is also possible that the forum is where infringement has occurred⁹⁸. Nevertheless, most commentators agree that ‘where protection is claimed’ should be read ‘for which protection is claimed’ reflecting the application of the *lex protectionis*⁹⁹.

Agreeably, most authors today see the last sentence of the second paragraph of art 5(2) BC as an expressed *lex protectionis* rule. However, Dr. Van Eechoud argues that the whole confusion is caused because of the desire to read a conflict rule in art 5(2) ‘...it seems unlikely to me that the drafters meant it to lay down the *lex protectionis* but neglected to put it unequivocal language’¹⁰⁰. Dr. Van Eechoud continues her argument by saying that if one insists on reading a conflict rule in art 5(2) one should acknowledge that it does not cover all

⁹⁶ This is Schack’s interpretation of art 5(2) BC cited in Eechoud, 2003, pp 108-109.

⁹⁷ In support of this view for example Fawcett and Torremans, 1998, pp 467-468.

⁹⁸ Adeney, 2006, pp 633-634.

⁹⁹ Eechoud, 2003, pp 106-110, Fawcett and Torremans, 1998, pp 467-468.

¹⁰⁰ Eechoud, 2003, p108. However, unlike Dr. Eechoud, Professors Rickeston and Ginsburg are of the opinion that the BC ‘failed’ to create a general structure for identifying applicable law, see Rickeston and Ginsburg, 2006, p 1300. The use of the term ‘failed’ -in this writer's opinion- implies that Ginsburg and Rickeston considered identifying the applicable law as one of the Berne Convention goals.

copyright issues, especially not questions of initial ownership and transfer of copyright¹⁰¹.

But what is *lex protectionis*? Some understands *lex protectionis* to be the law of the country where the work is used or where exploitation of the work takes place¹⁰². Others understand the reference here to be for the *lex loci delicti* (the law of the place where *delicti* ‘wrongful act’ was committed) that is the law of the place of infringement¹⁰³. In practice, the *lex loci delicti* will most likely be the place where the work is exploited or used. However, it is impossible to determine whether an infringement has occurred or not before determining the law whose criteria for infringement are to be applied, thus is circular. It has to be read as the place where the infringement has allegedly occurred¹⁰⁴. Although *lex loci delicti* governs infringement, it does not necessarily address issues of existence, ownership and transfer of IP because these situations do not meet the category (tort or infringement of copyright) which the *lex loci* traditionally address. On the other hand *lex protectionis* is not confined to torts, thus, can be used as a general conflict rule for copyright¹⁰⁵. Therefore, it is inaccurate to use the term *lex protectionis* and *lex loci delicti* interchangeably.

Another important point to keep in mind is that in the third paragraph of art 6bis BC, only means of redress for safeguarding moral rights are to be governed by the law of the country where protection is claimed. On the other hand, art 5(2) BC in relation to the economic rights states that the law of the country where protection is claimed is to govern ‘the extend of protection, as well as the means of redress’. Therefore, one wonders whether extend of protection for moral rights should be governed by *lex loci protectionis*.¹⁰⁶

¹⁰¹ Eechoud, 2003, p 109 also in support of this view Ricketson and Ginsburg, 2006, p 1299.

¹⁰² Fawcett and Torremans, 1998, pp 467-468.

¹⁰³ A. Lucas supports this view cited in Adeney, 2006, p 635.

¹⁰⁴ Mentioned in Adeney, 2006, p 635.

¹⁰⁵ Eechoud, 2003, p 106.

¹⁰⁶ Davis and Garnett, 2010, pp 1022, 1027-1029.

What is clear in relation to the BC is the lack of explicit reference to any choice-of-law rule other than the one mentioned in art 14*bis* (2) (a) concerning cinematographic works. It is likely that the contracting states assumed that actions will be brought in the country where infringement took place¹⁰⁷. That is because infringement of copyright was actionable as delict. Hence, jurisdiction was confined to courts of the place of infringement. The result was that *lex fori* and *lex loci delicti* coincided¹⁰⁸.

Today, the conventional view is to subject existence and scope of copyright to *lex protectionis*. The rule is understood to refer to the law of the country for which protection is claimed¹⁰⁹. It is based on the concept of territoriality of IP¹¹⁰, and the state's duty to grant foreign authors and foreign works the same rights of their nationals¹¹¹.

Still, questions of initial ownership and transfer of copyright, as Dr. Van Eechoud rightly argues, are not covered under art 5(2) BC. Furthermore, the ECJ's ruling in TOD's case is an invitation for commentators to revisit their

¹⁰⁷ Ricketson and Ginsburg, 2006, p 1301 also Eechoud, 2003, p 108.

¹⁰⁸ Eechoud, 2003, p108.

¹⁰⁹ This choice-of-law rule was applied by the French court de Cassation in *Societe Fox – Europa v Societe le Chat du Monde*, (1960) 28 R.I.D.A. 120.

¹¹⁰ Ricketson and Ginsburg, 2006, p1301; Eechoud, 2003, pp 105-106; Charlotte Waelde and Lionel De Souza, 'Moral rights and the Internet: squaring the circle' [2002] IPQ 272 (hereafter referred to as Waelde and De Souza, 2002).

¹¹¹ Mireille Van Eechoud, 'Alternatives to the *lex protectionis* as the choice of law rule for initial ownership of copyright' in Josef Drexler and Annette Kur (eds), *International Property and Private International Law – Heading for the Future* (Hart Publishing, Oregon 2005) 292-293 (hereafter referred to as Eechoud, 2005); Waelde and De Souza, 2002, IPQ 272.

opinions. The judgment has expressed the view that the purpose of the BC is not to determine the applicable law¹¹².

The view is approved by WIPO where it states that:

... neither does the national treatment principle reflect a private international law approach, as it does not purport to designate the law of any particular country that is to govern an intellectual property issue involving a foreigner, but merely states that foreigners should not be treated differently than nationals with respect to intellectual property issues¹¹³

ii. Rome Convention – Art 2¹¹⁴

This convention deals with protection of performers, producers of phonograms and broadcasting organisations. The national treatment principle was drafted in a way similar to that provided by art 5 BC. Foreign performers will be treated like national ones if the performance takes place or broadcasted or first recorded or first published on the territory of that country, the same rule applies to foreign producers and broadcast organisations¹¹⁵. Hence, the law of the country where protection is claimed will be that of the country where the right in the performance is used.

¹¹² Case (C- 28/04) of 30 June 2005 *Tod's SpA and Tod's France SARL v Heyraud SA*, para 32.

¹¹³ WIPO guidelines on Private International Law, Harmonization and Intellectual Property, available [online](http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap4.html#_ftnref395) at [<http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap4.html#_ftnref395>](http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap4.html#_ftnref395) Last accessed 30 Sep 2012, para 279.

¹¹⁴ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, done at Rome 1961. For details on the Rome Convention see Silke Von Lewinski, *International copyright law and policy* (Oxford University Press, New York 2008) 86-91 (hereafter referred to as Lewinski, 2008).

¹¹⁵ Rome convention 1961 art 2.

iii. TRIPs – Art 3 and 9¹¹⁶

The major concern under TRIPs was the use of exclusive IP rights to undermine free trade¹¹⁷. The 1985 GATT report stated that existing IP regime did not provide sufficient means to face piracy. As a result, the Uruguay Round aimed at setting up a permanent World Trade Organization (WTO) which had to be equipped with efficient dispute resolution mechanism to face piracy¹¹⁸.

The national treatment principle is recognized in art 3 of the Agreement. Protection was defined in the footnote of art 3¹¹⁹, thus, foreigners and nationals should enjoy the same protection for their substantial rights. This can be achieved through the application of the law of the protecting country¹²⁰.

¹¹⁶ Trade Related aspects of Intellectual Property rights 1994 (TRIPs). The agreement applies to all WTO members, that is 157 members on 24 Aug 2012 published on WTO website <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> Last accessed 12 Sep 2012. Generally see McQueen, Waelde and Laurie, 2008, p 27; Fawcett and Torremans, 1998, pp 480-481.

¹¹⁷ In relation to computer programs under TRIPs, the concern was that moral rights protection in the computer industry will hinder its growth and development. However, some commentators argue that moral rights should continue to exist in the digital age, see in general Mira T. Sundarajan, 'Moral rights in the information technology: A new kind of 'personal right'? [2004] IJL & IT 32-54 (hereafter referred to as Rajan, 2004).

¹¹⁸ Eechoud, 2003, p77. The US trade associations in 1983-84 submitted evidence to the Congressional hearings stating that members of those associations suffered huge international economic loss due to the absence of IP laws, for examples the Video industry lost \$6 billion annually see Fiona Macmillan, 'Copyright and Corporate Power' in Ruth Towse (ed), *Copyright in the cultural industries* (Edward Elgar, 2002) 104-106 (hereafter referred to as Macmillan, 2002).

¹¹⁹ Footnote (3) in art (3) reads: 'For the purposes of Articles 3 and 4, "protection" shall include matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in this Agreement'.

¹²⁰ Fawcett and Torremans, 1998, p 481.

Therefore, any interpretation favouring the application of the law of the country of origin or the law of the forum is no longer acceptable because it is considered a breach of art 3 of the TRIPs agreement¹²¹. However, the law of the forum can still be applied to administrative and judicial procedural matters within firm limits¹²². Article 9(1) TRIPs excludes protection of moral rights conferred under art 6*bis* BC. Exclusion is not only limited to those rights expressly mentioned in art 6*bis* but also right *derived* from this article. Nevertheless, there are strong arguments that the divulgation right is derived from article 10 and 10*bis* and not from art 6*bis*¹²³. Thus, should not be excluded by art 9(1) TRIPs.

Finally one should note that, unification of mandatory measures under TRIPs has restricted the scope of national policy¹²⁴.

¹²¹ Fawcett and Torremans, 1998, pp 480- 481. Note however, that Philip Johnson argued that although Torremans advocated for the application of *lex protectionis* under art 3 TRIPs in the book which he coauthored with Fawcett, Torremans – as Johnson argued- advocated for the application of the *lex originis* in his later work titled “Authorship, ownership of rights and works created by employees: which law applies?” [2005] EIPR 220, hence, Johnson concluded that there is a contradiction between the two works, see Philip Johnson, ‘Which law applies? A reply to Professor Torremans’ (2005) 1 JIPLP 71 (hereafter referred to as Johnson, ‘Which law applies?’ 2005); also read Professor Torremans’ reply to Johnson: Paul Torremans, ‘Which law applies? A reply from Professor Torremans to Philip Johnson’s reply to his earlier work’ (2005) 1 JIPLP 76-77 (hereafter referred to as Torremans, ‘Which law applies?’, 2005).

¹²² TRIPs art 3(2).

¹²³ Ricketson and Ginsburg, 2006, pp 617-618

¹²⁴ Jane C. Ginsburg, ‘International copyright: From a “Bundle” of National Copyright Laws to a Supranational Code?’ (2000) Columbia Law School - Public Law & Legal Theory Working Paper Group – Paper No. 10 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=222508 > last accessed 26 Sep 2012, p 8 (hereafter referred to as Ginsburg, 2000)

iv. WPPT – Art 4 and 5¹²⁵

Art 4(1) WPPT provides for the principle of national treatment. Moral rights were dealt with in art 5 of the Treaty. It was drafted based on art 6*bis* BC. According to paragraph (1), performers are granted the right to claim authorship and the right to object to derogatory treatment that would prejudice their reputation.

Art 5(3) adopts *lex loci protectionis* rule. It requires application of the law of the Contracting Party 'where protection is claimed' to govern means of redress. Hence, raising the same concern that was raised in relation to art 6*bis* (3) BC. The law applicable to extend of protection is not clearly addressed¹²⁶.

v. WCT – Art 1¹²⁷

WCT aims at bringing international copyright to meet technological and economical developments and to harmonize substantive copyright law¹²⁸. Principle of national treatment is not mentioned in this treaty, nor is there any choice-of-law rule. However, the Treaty expressly states in art 1(2) that none of its provisions derogate from existing obligations under BC. Accordingly, moral rights are to be protected – according to the substantive provisions of BC art 6*bis* - in the digital environment but without showing how¹²⁹.

¹²⁵ WIPO Performances and Phonograms Treaty, Geneva 1996 (WPPT)

¹²⁶ See our previous discussion in relation to BC.

¹²⁷ WIPO Copyright Treaty, Geneva 1996 (WCT).

¹²⁸ See WCT preamble.

¹²⁹ For more details see Smita Kheria, 'Moral rights in the digital environment: Authors absence from Authors' rights debate' BILETA annual conference, (April 16-17 2007) <<http://www.bileta.ac.uk/Document%20Library/1/Moral%20rights%20in%20the%20Digital%20>

D. Interim conclusions:

Examination of the related international instruments showed that there was no explicit choice-of-law rule in any of them. The BC is the crucial instrument whose pattern was followed by subsequent treaties. Its goal in relation to moral rights was to ensure providing independent protection for these rights. Member States were allowed to establish their own ways for this protection by adhering to the minimum standards in the Convention¹³⁰. And even if one agrees that the BC includes a choice-of-law rule, this arguable application can only be limited to infringement scenarios. Questions of validity, ownership and authorship of moral rights are clearly not regulated in BC.

[Environment%20-%20Authors'%20absence%20from%20Authors'%20rights%20debate.pdf](#)>last accessed 28 Sep 2009 (no longer available online) (hereafter referred to as Kheria, 2007); also J. A. L. Sterling, *World Copyright Law* (2nd edn Sweet & Maxwell, London 2004) 339 (hereafter referred to as Sterling, 2004).

¹³⁰ Davis and Garnett, 2010, p 1028.

Chapter II

Moral rights in cross-border contracts and the application of choice-of-law rules

Choice-of-law rules within the European Union – except Denmark- are now governed by Rome I Regulation on the law applicable to contractual obligations¹³¹ (Rome I) and Rome II Regulation on the law applicable to non – contractual obligations¹³² (Rome II).

'National' choice-of-law rules only apply to the excluded subject matters from the scope of the Regulations. Moreover, non – Member States who are not subject to the Rome I and II Regulations, are expected to apply their domestic choice-of-law rules.

Since the Rome Convention 1980, there has been common European ground regarding applicable law to contractual obligations. However, more clarification is needed when there is no clear choice-of-law in IP contracts¹³³. To be exact, identification of the ‘characteristic performance’ is necessary to determine the applicable law to contracts involving moral rights¹³⁴.

This chapter will cover the position of moral rights in cross-border contracts as an element of copyright law. Therefore, rules of Rome I Regulation must be studied.

¹³¹ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

¹³² Regulation (EC) No 864/2007 of the European Parliament and the Council of 11 July 2008 on the law applicable to non - contractual obligations (Rome II).

¹³³ Annette Kur, ‘Are there any common European principles of private international law with regard to intellectual property?’ in Stefan Leible and Ansgry Ohly (eds), *Intellectual property and private international law* (Mohr Siebeck, Tübingen 2009) 4 (hereafter referred to as Kur, 2009).

¹³⁴ Kur, 2009, p 4.

At the same time, CLIP¹³⁵ and ALI¹³⁶ Principles are significantly influential. Accordingly, the current examination will take into account how the three instruments (Rome I, CLIP and ALI) deal with each related issue.

A. Copyright in cross-border contractual obligations: Examining choice-of-law rules

Copyright contracts can take the form of license, assignment or waiver. Assistance in determining the applicable choice-of-law rules to copyright contracts can be found in the following:

¹³⁵ The European Max – Planck Group on Conflict of Laws in Intellectual Property (CLIP) has prepared the final draft of these principles (The Draft) on March 25, 2011 < <http://www.cl-ip.eu/>> last accessed 15 Sep 2012.

¹³⁶ American Law Institute (ALI) was established in 1923 as a non-profit organization, when first established the ALI was wholly American in its members and aimed at simplifying the law and increasing its certainty within the national legal system. There is no mention in the early written records of ALI of profiting from the use of comparative method in terms of looking at the experience beyond American borders. This was reflected in the first 9 restatements completed by ALI before the end of the WWII. However, the influence of comparative law can be found in the ‘revolutionary’ choice of law doctrine leading to the Second Restatement, the influence was from German émigrés including Rabel as well as from American comparative law scholars. More on ALI and unification of law see David S. Clark, ‘The stool’s third leg: unification of law in Berlin, Rome, and Washington from the 1920s to the 1940s’ in Jurgen Basedow and others, *Aufbruch nach Europa: 75 Jahre Max - Planck - Institute für Privatrecht* (Mohr Siebeck, Tübingen 2001) 45-49 (hereafter referred to as Clark, 2001).

1. Article 3 and 4 of Rome I Regulation¹³⁷

Rome I Regulation applies to conflict-of-laws situations in civil and commercial matters. There is no special reference in the Regulation to IP rights. However, the provisions of the Regulation should still be applied as IP rights are not excluded from the scope of the Regulation¹³⁸. Accordingly, copyright contracts will be included under this broad heading. In relation to copyright, licence and assignment¹³⁹ are the most common types of contracts.

Rome I Regulation views party autonomy or the parties' freedom to choose the applicable law as 'one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations'¹⁴⁰. The applicable law will govern interpretation of the contract, performance of contractual obligations, including assessment of damages if it is governed by rules of law¹⁴¹.

¹³⁷ The Rome convention has been incorporated into English law and brought into force by the contracts (applicable law) Act 1990 – The act applied to contracts made after 1 April 1991. The Rome I Regulation replaces the Rome Convention 1980 in the EU Member States, it applies to contracts concluded as from 17 December 2009. It was incorporated into England, Wales and Northern Ireland by the Statutory Instrument No. 3064 Private International Law – The Law Applicable to Contractual Obligations Regulations 2009. Generally see on contractual obligations Clarkson and Hill, 2006, ch 5.

¹³⁸ Excluded subject matter from the scope of the regulation are listed in Art 1(2) Rome I. Keep in mind that according to art 2 any law would apply whether or not it is the law of a Member State (universal application). This means if the court in question has jurisdiction and the contract falls within the scope of the Regulation, then rules of Rome I must be applied. See Svantesson, 2007, pp 218-219.

¹³⁹ Assignment is not similar to sale of the complete right, it can be limited in time and scope. For more details Fawcett and Torremans, 1998, p 572.

¹⁴⁰ Rome I – recital 11.

¹⁴¹ Rome I – article 12.

If no express choice-of-law was made, then art 4 applies. The applicable law in this case becomes the law of the country which has the 'closest connection' with the contract. The closest connection presumption is determined according to the characteristic performer. The applicable law is the law of the country where the party carrying out the characteristic performance is habitually residence at the time of the conclusion of the contract.

2. Article 3:501 and 3:502 of CLIP

According to art 3:501 and 3:502, party autonomy is the first rule in relation to IP contracts. In the absence of choice, the applicable law should be that of the state with the closest connection to the contract. When determining the state with the closest connection to the contract, several factors are listed to help decide whether the contract is most closely connected to the state of the transferor / licensor or transferee / licensee. However, if the contract was a transfer or a license of IP for multiple states, then the State presumed to be most closely connected with the contact will be that in which the creator, transferor or licensor has his habitual residence at the time of conclusion of the contract.

3. Article 315 of ALI Principles

Art 315 of ALI Principles deals with ‘transfers of titles and grants of licenses’. According to this article, the first rule in relation to the law applicable to contractual obligations in relation to IP is the law chosen by the parties. However, in the absence of choice-of-law agreement, the law of the state with the closest connection to the contract applies. It is presumed that the state with the closest connection to the contract is that in which the assignor or the licensor resides at the time of the execution of the contract¹⁴².

B. Validity of contractual waiver of moral rights: Exploring applicable choice-of-law rules

Assignment and license of copyright is common practice. Yet, the situation is more complicated in relation to moral rights. Legal systems which recognize moral rights, agree that these rights cannot be subject to licence or assignment.¹⁴³ Any transfer of ownership of these rights contradicts with their nature. The special link or bond between the author and his work cannot be subject to transfer¹⁴⁴. Hence, there is almost a unanimous view that moral rights

¹⁴² In relation to E-contract, Dr, Ala’a Aldeen Moh’d Ababnah opinion is that the traditional rules applicable to normal contracts can be sufficiently applied to E-contracts since –as he argues- E-contracts are usual contracts with one main difference that is concerning the form of expression for one’s will, Ala’a Aldeen Moh’d Ababnah, *Conflict of laws in international E-contract: comparative study in the Bahraini law* (Applied Science University Press, Bahrain 2008) 442 (hereafter referred to as Ababnah, 2008). In relation to copyright this means if copyright was the subject of an E-contract then traditional rules should be applied.

¹⁴³ See for example: CDPA 1988 s 94, Bahraini Author’s Right Act 2006 art 5(1) and the French IP Code art L121-1.

¹⁴⁴ The question of whether moral rights could be transferred or not was met by diverse opinions; for example, Pouillet in 1878 accepted the notion of authors giving up their rights contractually,

are not assignable¹⁴⁵ and accordingly no choice-of-law problems arise in this respect¹⁴⁶.

However, waiver does not alienate or transfer rights, it simply makes them unenforceable. As a result, some common law jurisdictions allowed contractual waiver of moral rights¹⁴⁷. This was criticised because it ignored the position of authors as the weaker party in contracts. The criticism is particularly relevant to authors' positions in industries that exploit copyright, such as music publishers and producers who usually insist on a complete waiver of moral right as a condition for publishing the work¹⁴⁸.

although an author who agrees to have his work misattributed to someone else would result in undertaking a fraud on the public. Gierke agreed to the possibility of an author expressly transferring his rights, where Morillot questioned such action on the basis of the intimate relation between an author and his work. See Adeney, 2006, p 64.

¹⁴⁵ Taitano and Farb provide a table of international moral rights where moral rights are examined by country; the working document covers: Australia, Canada, Member States of the EU and the USA, Melissa Taitano and Sharon Farb, 'International Moral rights: Working document - Moral rights by country ' (2005) InterPARES 2 Project - Policy Cross-domain available online at [http://www.interpares.org/display_file.cfm?doc=ip2\(policy\)moral_rights.pdf](http://www.interpares.org/display_file.cfm?doc=ip2(policy)moral_rights.pdf) last accessed 5 Aug 2012 (hereafter referred to as Taitano and Farb, 2005) however, for a table of world moral rights with wider coverage of jurisdictions see Adeney, 2006, pp 720-797.

¹⁴⁶ For example CDPA1988 – s 94, for more details Fawcett and Torremans, 1998, pp 515-517.

¹⁴⁷ Waiver of moral rights is permitted in the UK under CDPA 1988 s 87 as well as in the USA under art 106A known as the Visual Artistic Rights Act (VARA) 1990 section e (1), Ciolino, 1994, Tul. L. Rev. 944. However, the French Intellectual Property Code (IPC) article L121-1 strictly stresses the inalienability of moral rights, Dietz, 1993, p 74.

¹⁴⁸ Taitano and Farb, 2005, pp 162-163; also See Bently and Sherman, 2004, pp 248-249.

As waiver is clearly permitted in common law tradition, it is not clearly so in civil law tradition. The general rule is that waiver of moral rights is unpermitted. Nevertheless, the criterion in the French system to decide on the validity of waiver is to consider its *nature*. A general waiver where authors sign on future modifications of their works without given the authority to ratify them¹⁴⁹, is null and void.

Professor Dietz believes that a consent given by the author to waive his right should not be ignored. Still, in the process of balance of interest, the judge should take into account that authors are usually the weaker party. Professor Dietz therefore suggests leaving the existence of consent and waiver to be decided by the judge, in the process of achieving balance of interests¹⁵⁰.

What is surely prohibited is the *blanket* waiver of the author's right to protect the integrity of his work¹⁵¹. Advance consent to an open-ended list of modifications that is only subject to the discretion of the publisher, is a classical example of a void waiver¹⁵².

In the *Barbelivien* case¹⁵³, the authors and subject to a contract of assignment had provided the publisher with advance written consent to a list of modifications to their work, including using their songs in a second work and

¹⁴⁹ See Dietz, 1993, p 74.

¹⁵⁰ Dietz, 1994, IIC186.

¹⁵¹ Edward J. Damich, 'The right of personality: a common – law basis for the protection of the moral rights of authors' 23 (1988) Ga. L. Rev. p 17 (hereafter referred to as Damich, 1988).

¹⁵² Continental Europe examine the scope of the waiver to make sure that the essence of the rights is not effected, whereas in the US courts care about the validity of the individual's consent given at the time of the waiver, not the scope itself, Lucie M.C.R. Guibault, *Copyright limitations and contracts: an analysis of the contractual overridability of limitations on copyright* (Kluwer Law International, London 2002) 176 (hereafter referred to as Guibault, 2002).

¹⁵³ D Barbelivien v Sté Agence Business (2003) 196 R.I.D.A. 280.

changing the lyrics for the purpose of such adaption. The publisher (defendant) was an Italian company and the contract was subject to Italian law. The defendant (sub-licensed advertising agency) altered the lyrics, and the author subsequently brought an action for moral rights infringement arguing that contractual assignment of moral rights was invalid. Paris court of Appeal agreed to apply French law because moral rights had a public policy character, however, found that the authors exercised their moral rights by giving advance written consent because the contract clauses were detailed i.e. it was not a case of invalid waiver. Nevertheless, the Cour de Cassation disagreed and reversed the ruling in 2003. It held that the right to respect for one's work is a public policy principle, hence, advance waiver of moral rights is not permitted¹⁵⁴.

Disagreement between the two legal traditions in relation to waiver of moral rights is probably supported by the vague language used in the BC. Commentators disagree on whether article *6bis* of the BC permits impairing moral rights or not. And some suggest that art *6bis* BC does not prohibit contractually impairing moral rights¹⁵⁵.

With regard to the Rome I Regulation, there is no illustration of how moral rights can be incorporated into contracts. This comes as no surprise as the Regulation is not designed to deal with substantive law. Surprisingly however, illustrative examples for license and assignment contracts in which moral rights are involved can be found in the ALI principles¹⁵⁶.

¹⁵⁴ Case also discussed in Winston Maxwell, 'Moral rights clauses after Barbelivien' [2004] Ent L. R. 121 (hereafter referred to as Maxwell, 2004).

¹⁵⁵ In favor of this view Paul Edward Geller 'Conflict of laws in copyright cases: infringement and ownership issues: are laws of 200 different jurisdictions ... applicable?' WIPO World Forum (Oct 1995) <http://www.criticalcopyright.com/Geller-Copyright_Conflicts_Laws.pdf> last Accessed 20 Sep 2012, p 378 (hereafter referred to as Geller, 1995).

¹⁵⁶ See illustrations of art 314 ALI principles.

1. Art 10 (1) of Rome I

Art 10(1) of the Regulation subject 'existence and validity of a contract, or of any term of a contract' to 'the law which would govern it under this Regulation if the contract or term were valid.'

In relation to moral rights, the law that determines the validity of waiver is the law chosen by the parties. If no choice has been made then, the law of the country where the party required to affect the characteristic performance of the contract is habitually resident.

2. Art 3:301 of CLIP

Art 3:301 of CLIP addresses the issue of transferability. According to this article, the law of the State for which protection is sought will determine whether the transfer or license can be invoked or not.

In relation to moral rights, this means that the law of the country for which protection is sought will determine whether moral rights can be waived.

Hence, if France is the country for which protection is sought, waiver of moral rights - as a general principle- will not be permitted. However, if England was the country for which protection is sought waiver of moral rights will most likely be considered valid.

3. Art 314 of ALI principles

Art 314 states that the law of the State for which rights are transferred governs the extent of their transferability and determines any recordation rules relating to the transfer. In the illustrative examples following the article, it becomes clear that what is meant by the State for which rights are transferred is the State of exploitation i.e. the state for which protection is sought. Therefore, the ALI principles adopt the same rule adopted in CLIP.

C. Allocating the characteristic performance in moral rights contracts

In relation to contracts, it is important to identify what the characteristic performance is in order to identify the law most closely connected to the contract. This task might be relatively straight forward in general contracts. However, it is more complicated in copyright contracts and especially in relation to moral rights.

1. Art 4(2) of Rome I

The objective connecting factor under art 4(2) of Rome I, is habitual residence, or respectively the central administration of the party who is to affect the performance that is characteristic to the contract.

The closest connection presumption is determined according to the characteristic performer. The applicable law is the law of the country where the party carrying out the characteristic performance is habitually residence at the time of the conclusion of the contract¹⁵⁷. The term ‘characteristic performance’ is derived from Swiss law and it refers to the performance which reflects what the contract is about¹⁵⁸. Therefore, in sales contract the characteristic performance is selling

¹⁵⁷ According to the Giuliano-Lagarde Report, choosing the law of the place of the principle place of business of the characteristic performer over the law of the place of performance was a deliberate decision. This however raises another concern in relation to the Brussels Regulation where jurisdiction is permissible under art 5(1) in courts of the place of performance of the obligation, O’Brian Jr., 2004, p 13.

¹⁵⁸ William E. O’Brian Jr., ‘The dancer or the dance: choice of law under the Rome Convention’ (2004) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1503960> last accessed 7 Sep 2012, p 4 (hereafter referred to as O’Brian Jr., 2004).

and delivering the goods, and in service contract it is providing the service. In general, if the contract is between two parties one of them pays money and the other is obliged to do something else, the characteristic performer is the latter party¹⁵⁹. Note however that if it is difficult to identify a single characteristic performance—such as when there is an international exploitation of the right - or if it appears from the circumstances as a whole that the contract is more closely connected with another country then the law of the country with the closest connection should be applied¹⁶⁰.

If copyright contracts grant rights to a single country, the closest connection will exist with that country where normally exploitation takes place (the country of protection). The situation however, is more confusing when books are printed in a third country. This is because printing, distribution and sale of books form part of exploitation. If copyright rights are granted in respect of more than one country, then the essential element is still exploitation of the work, and thus where the exploiter of the work is established¹⁶¹.

In that case, the characteristic performer in a contract involving waiver of moral rights is the author who waives his moral rights.

2. Art 3:502 of CLIP Principles

Nothing in CLIP deals with characteristic performance. The term as such is not used because these are especially designed principles for IP rights. Nevertheless, the rules adopted in art 3:502 CLIP regarding determining the applicable law in the absence of choice adopts the same principle.

¹⁵⁹ O'Brian Jr., 2004, p 4.

¹⁶⁰ Rome I – art 4(3) and 4(4).

¹⁶¹ For more details see Fawcett and Torremans, 1998, pp 574-577.

The law presumed to be most closely connected to the contract, is the law of the State where the party affecting the contract is habitually resident. Hence, if the contract requires the licensee to exploit the work, he is the characteristic performer and the law of the State where he is habitually resident shall govern the contract. In relation to contracts concerning waiver of moral rights, the characteristic performer is the author, and hence the applicable law will be the law of the country where the author is habitually resident.

3. Art 315 of ALI Principles

The ALI principles also avoid using the term characteristic performance. Yet, the ALI principles are different from CLIP with regard to their adoption for a single rule. This is in relation to the applicable law to the contract in the absence of choice. Art 315 states that the law most closely connected in the absence of choice will be the law of the State in which the assignor or the licensor resided at the time of execution of the contract. This rule is an endorsement of the 'characteristic performance' principle. However, it is different in the sense that an assignor or licensor is always presumed to be the characteristic performer¹⁶² of the contract.

Accordingly, an author who waives his moral rights will always be the characteristic performer of the contract, and the law of the country where he resided at the time of the execution of the contract will be applied.

¹⁶² See paragraph 2 of illustrations to art 315 ALI principles.

D. Moral rights of employees: identifying the applicable law

The subject of moral rights of employees needs to be addressed separately because of its particularity. In general, there are three positions for employees' moral rights. The first is that an employee retains his title as the author and copyright owner of his creations, therefore, has the right to enforce his moral rights. The second is to have the employer as the first copyright owner, yet the employee maintains his authorship title along with his right to enforce his moral rights. The third and final position is to have the employer as the first copyright owner, while depriving the employee from his right to exercise his moral rights¹⁶³.

The issue at question is whether an employee – who is the actual creator of the work - is given the right to enforce his moral rights or not¹⁶⁴. The question is naturally in relation to cross-border employment contracts. And the goal is to identify the applicable law according to choice-of-law rules in Rome I, CLIP and ALI Principles.

¹⁶³ Example: C.D.P.A 1988 – s 11(2) and s 79(3)(a).

¹⁶⁴ Whether employees should be entitled to moral rights protection or not has been an ongoing problem. This writer agrees with those who differentiate between employees' works based on the level of artistic freedom they enjoy when creating the work, however, this is a matter to be decided according to the substantive provisions of the applicable law and is therefore not to be decided according to PIL rules. For discussion on employees' moral rights with a suggested solution see Orit Fischman Afori, 'Employees' moral rights: The Israeli solution to an ongoing dilemma' [2008] E.I.P.R. 521-526 (hereafter referred to as Afori, 2008).

1. Art 8 of Rome I

At the EU level, employment contracts are governed by art 8 Rome I Regulation. Preference is given to the law chosen by the parties. However, in the absence of expressed choice-of-law, the law applicable is the law of the country in which or from which the employee habitually carries out his work in performance of the contract. And as a general rule, nothing in the Regulation restricts the application of the overriding mandatory rules of the forum¹⁶⁵.

2. Art 3:503 of CLIP Principles

CLIP adopts the same principle adopted by Rome I. Art 3:503 provides for the application of the law chosen by the parties to determine the mutual obligations of the employee and employer, and the transfer or license of an IP right. The second paragraph of the same article states that if no law has been chosen by the parties, then the applicable law will be that of the place where the employee habitually carries out his work. In any case, if “it appears from the circumstances as a whole that the contract is more closely connected with a State other than that indicated in paragraph 2, the law of that other State shall apply”¹⁶⁶

¹⁶⁵ Rome I - art 9(2).

¹⁶⁶ Art 3:503 (CLIP).

3. Art 311 and 312 of ALI principles

The ALI principles address contractual relationships in relation to IP rights only to determine the applicable law to initial title to registered rights and unregistered trademarks and trade-dress rights¹⁶⁷. According to these principles, in the context of employment agreements, the law chosen by the parties should govern the relationship and hence determine who the initial owner of the registered right in question is or the unregistered trademark or trade-dress rights. If no choice-of-law has been made, then the law of the State with the closest connection with the parties and the subject matter should apply. However, nothing in these principles discusses the applicable law to any other issue besides initial title. In fact, questions of initial title in copyright and authorship are not addressed. Thus, no sufficient guidance is available under these principles.

E. Interim analysis and conclusions:

In practice, cross-border disputes concerning moral rights contracts can only be in relation to waiver of moral rights.

It is important to point out that waiver of moral rights is a matter linked with the grant of the right. The law which determines existence and scope of the right should also determine whether the right can be waived or not. Thus, it is certainly not possible to leave this issue to be governed by the law of the contract. To do so means allowing the stronger party (usually not the author) to choose a law that permits waiver of moral rights. Therefore, in the light of the general rule, conditions of waiver are to be governed by the law of the contract, only if the law of the protecting country allows the principle of waiver of the

¹⁶⁷ ALI principles - Art 311 and 312.

right¹⁶⁸. This was followed by the French courts in *Anne Bragance v Olivier Orban and Michel de Grece*¹⁶⁹ where Anne transferred all aspects of copyright to Michel by a contract which was governed by New York law. French law was the law of the protecting country -because the book was published in France. French courts decided that the law of the protecting country, being in this case France, is used to determine which rights were assignable. However, New York law as the law of the contract governs the validity and scope of the actual transfer. Since moral rights in France cannot be contractually assigned or transferred, French courts identified Anne as the author on every copy of the book published in France. Yet, she was not given any pecuniary compensation because assignment of those rights was effective¹⁷⁰.

Application of *lex protectionis* to determine conditions of transfer of copyright including moral rights does not appear to be the most suitable approach. For example, in *Anne Bragance* case the French court found itself obliged to separate issues of validity and scope from issues of assignability of the rights in question. Hence concluded, that the law governing the contract governs the first set of issues while the *lex protectionis* decides whether the subject matter of the right in question can be assigned or transferred or not. Because of such practical consideration and concerns, Professor Schack argues that the correct law to be applied is the law of the country of origin to determine whether the copyright or the exploitation right could be transferred in whole or in part¹⁷¹. To support his view he explains that in conflict-of- laws, distinction between obligation (*causa*)

¹⁶⁸ For general discussion regarding transferability of the right see Fawcett and Torremans, 1998, pp 515-517.

¹⁶⁹ (1989) 142 RIDA 301 discussed in Fawcett and Torremans, 1998, pp 549-550.

¹⁷⁰ Fawcett and Torremans, 1998, p 517.

¹⁷¹ Haimo Schack, 'The law applicable to (unregistered) IP rights after Rome II' in Stefan Leible and Ansgary Ohly (eds), *Intellectual property and private international law* (Mohr Siebeck, Tübingen 2009) 95 (hereafter referred to as Schack, 2009).

and disposition is accepted and there is no reason to ignore this achievement just for IP rights¹⁷².

Clearly, in the context of employment contracts, question of initial ownership should not be governed by *lex protectionis*. To say otherwise means, employers can find themselves – in some jurisdictions- marketing a product they have no copyright ownership in¹⁷³. The same problem applies if *lex protectionis* was to govern question of authorship since employers can face claims related to moral rights infringement brought by their employees in certain jurisdictions. However, some argue that if the applicable law is *lex originis*, then the advantage is that one single law applies to all issues of ownership¹⁷⁴. Yet, there is another important factor that one needs to bear in mind in relation to works created by employees. It is the nature of the employee's duties in the labour relationship in which he is engaged. These duties embody his intellectual creations, hence, it is probably best to have these subject to the law governing the employment contract¹⁷⁵. This law will determine who the initial owner of the copyright is and whether employees are entitled to enforce their moral rights as authors or not. The *lex contractus* in this sense will provide legal certainty for the parties and will increase the level of predictability for exploiters¹⁷⁶.

¹⁷² Schack, 2009, p 95.

¹⁷³ Paul Torremans, 'Authorship, ownership of right and works created by employee: which law applies?' [2005] E.I.P.R. 223 (hereafter referred to as Torremans, 'Authorship, ownership' 2005) also Eechoud, 2003, p 179.

¹⁷⁴ Torremans, 'Authorship, ownership', 2005, E.I.P.R. 223.

¹⁷⁵ Eechoud, 2003, pp 179, 189-190; Torremans, 'Authorship, ownership', 2005, E.I.P.R. 223; Fawcett and Torremans, 1998, pp 513-515; Guido Westkamp, 'research agreements and joint ownership of intellectual property rights in private international law' [2006] IIC 656 (hereafter referred to as Westkamp, 2006),

¹⁷⁶ Application of *lex contractus* to the question of initial ownership in the course of employment is the accepted approach by most European reports, see Toshiyuki Kono, 'Intellectual property and private international law: General report' [2010] International Academy of comparative law

Chapter III

Examining the choice-of-law rules applicable to moral rights in cross-border torts

This chapter is devoted to examining the applicable choice-of-law rules to moral rights in cross-border torts. The issue of moral rights infringement is probably the most significant of all. This is because cross-border infringement of moral rights is more likely to occur in comparison to any other issue. In addition, questions of authorship and initial ownership will also be addressed in this chapter. This is necessary so one would have an adequate understanding of how the current situation is handled.

Therefore, this chapter shall examine the applicable choice-of-laws rules to: authorship, initial ownership, scope and cross-border infringements of moral rights. The chapter will follow the same pattern adopted in the previous chapter. Hence, examination for the currently applicable choice-of-law rules will cover: Rome II Regulation, CLIP and ALI principles.

– Washington Congress available at <<http://ssrn.com/abstract=1974124>> last accessed 25 Oct 2012, p 25 (hereafter referred to as Kono, 2010)

A. Authorship and initial ownership: Exploring the applicable law

1. Initial ownership:

The debate about initial ownership aims at achieving a balance between legal certainties and respecting the diversity in allocation regimes¹⁷⁷. Furthermore, the adoption of a choice-of-law rule for copyright ownership should promote the international dissemination of works of authorship¹⁷⁸.

In order to fulfil these goals, States followed different approaches. Some are of the opinion that each Member state is free to apply its conflict rule to determine initial ownership of copyright. The BC expressly states in art 14*bis* (2)(a) that *lex protectionis* is to be applied to initial ownership of copyright in cinematographic works. It is not clear whether Member States wanted to introduce an exception to the general rule in relation to cinematographic works or not, all that is clear is that Member States did not agree on who was the author of cinematographic works. Therefore, if the same rule was applicable to all other works why would the draftsman restrict the application to one category of works?¹⁷⁹. Note that, this provision covers moral rights as well:

Contrary to the impression given by the English text, this provision covers all the authorial rights, including the moral rights. If, for example, UK law were the *lex loci protectionis*, the economic rights would be in the hands of the producer and director as authors but the moral rights in the hands of the director alone¹⁸⁰

¹⁷⁷ Eechoud, 2005, pp 290-292.

¹⁷⁸ Ricketson and Ginsburg, 2006, pp 1320-1321.

¹⁷⁹ Fawcett and Torremans, 1998, pp 511-512; Ricketson and Ginsburg, 2006, pp 1300, 1316-1317; Torremans, 'Authorship, ownership' 2005, E.I.P.R. 222.

¹⁸⁰ Adeney, 2006, p 636.

On the other hand, some argue that it might seem logical to assume a link between the issue of copyright and to whom it is granted, thus apply the same law of the protecting country (*lex loci protectionis*). Dr. Gottschalk is in favour of the application of *lex protectionis* to initial ownership as well as to infringement. He argues that until a truly worldwide agreement is reached, this rule needs to be supplemented with an escape clause enabling courts to resort to the country with the closest connection to the dispute¹⁸¹. However, some believe that in practice this approach needs to be rejected because it will result in giving different ownerships to different persons in different countries¹⁸². In addition, as some argue, having initial ownership governed by *lex loci protectionis* means favouring the most protective regime¹⁸³. Commentators like Dr. Van Eechoud called for alternatives to the *lex protectionis* to be applied to question of initial ownership of copyright. The attempt to drift away from *lex protectionis* finds its support in the legal uncertainty accompanied with this rule, many laws apply to the same work at the same time resulting in a simultaneous application¹⁸⁴. So, if country A considers X the initial copyright owner of the work, he will be able to invoke his rights to prevent circulation of his work in the whole world, although country B might find that X is not the initial copyright holder¹⁸⁵.

¹⁸¹ Gottschalk, 2007, pp 216-219.

¹⁸² For more details see Fawcett and Torremans, 1998, pp 511-512.

¹⁸³ Mrs. Thum's view cited in Asa Hellstadius and Wolf Meier-Ewert, 'Jurisdiction and choice of law in intellectual property matters – perspectives for the future (EU and worldwide)' [2005] IIC 334 (hereafter referred to as Hellstadius and Meier-Ewert, 2005).

¹⁸⁴ Eechoud, 2005, pp 296-298; also Thum, 2005, pp 281-282.

¹⁸⁵ Some argue that applying the *lex protectionis* to initial ownership is to have one sided approach that would favor the interest of the droit d'auteur over copyright system countries, see Thum, 2005, pp 281-282.

To solve the problem, scholars called for the application of the country of origin rule (*lex originis*) to determine initial ownership¹⁸⁶. This rule is also called ‘principle of universality’ because the ownership issue is decided according to only one national copyright law. According to this rule, ownership does not change when the work crosses borders¹⁸⁷. As Professor Schack explains, initial ownership has to be answered once and for all according to the law of the country of origin, this country is the place where the work was first published. If the work was not published then the author’s nationality, and in relation to cinematographic works by the actual seat of the film producer¹⁸⁸. This in turn secures international contracts and promotes international exchange of copyrighted works¹⁸⁹. Therefore, *lex originis* is expected to better serve the efficiency goal¹⁹⁰. Nevertheless, the forum may still disturb this application by applying the public policy exception for example¹⁹¹. Number of commentators criticise the country of origin rule. This is because there is no clear definition of ‘country of origin’ and ‘publication’. Terms used in the BC in art 3 and 4 were not defined for the purpose of serving as a connecting factor for a conflict rule¹⁹². Moreover, if the work was first published in the internet which country is the country of origin¹⁹³? Another concern was in relation to the effect of

¹⁸⁶ Fawcett and Torremans, 1998, pp 511-512. Yet, according to Ulmer, none of the delegations expressed the opinion that *lex originis* governs initial ownership cited in Eechoud, 2003, p 122.

¹⁸⁷ Thum, 2005, pp 275-278 also in favor of this principle, Fawcett and Torremans, 1998, pp 511-512; Ricketson and Ginsburg, 2006, pp 1320-1321. French and US case law adopted the *lex originis* to determine initial ownership see Gottschalk, 2007, p 191.

¹⁸⁸ Schack, 2009, p 94.

¹⁸⁹ There is growing body of case law supporting this view, Eechoud, 2003, p 119.

¹⁹⁰ Kur, 2009, p 12.

¹⁹¹ Ricketson and Ginsburg, 2006, pp 1320-1321, Kur, 2009, p 12.

¹⁹² Eechoud, 2003, p 123.

¹⁹³ Thum, 2005, pp 278-279.

applying several copyright laws to different works within the same territory according to their country of origin. Some suggest that it will affect exploiters, as they will need to be aware of the provisions of the law of the country of origin of each work they exploit. Therefore, this interpretation carries great practical problems and as some scholars conclude is arguably a wrong interpretation of the BC¹⁹⁴. Others understand the country of origin rule to favour the least protective regime¹⁹⁵. Still, French courts apply the law of the country of origin to issues of existence, originality and initial ownership, whereas, *lex protectionis* is applied to determine the content of the right and scope of protection¹⁹⁶. As for Rome II art 8(1) only deals with infringement issues, hence, it does not cover issues relating to ownership of intellectual property right¹⁹⁷.

Dr. Van Eechoud argues that IP rights try to strike a balance between the interest of the creator and that of the public. To maintain the locally achieved balance, application of *lex protectionis* is needed to determine the question of whether IP rights exist, if yes for how long and what their scope is. These matters are to be governed by the place of the use¹⁹⁸. This does not apply to questions of initial ownership as the public has no interest in who created the work, rather their

¹⁹⁴ Arguments against the *lex originis* were discussed in Fawcett and Torremans, 1998, pp 474-475.

¹⁹⁵ Mrs. Thum's view cited in Hellstadius and Meier-Ewert, 2005, IIC 334.

¹⁹⁶ Despite the fact that French law is silent on this issue, this rule has been established by leading judgment of the French Supreme Court in the well known case “*Rideau de fer*” *Boschiero*, no 6, this case is also known as *Shostakovich* case which is further discussed in Part 3.

¹⁹⁷ Ministry of Justice, ‘Guidance on the law applicable to non – contractual obligations (Rome II) outline of the main provisions’ (9 Feb 2008), p 9 para [26]. For more discussion on this point see Gottschalk, 2007, pp 197-199.

¹⁹⁸ Eechoud, 2005, pp 293-295. On the same point see Graeme W. Austin, ‘Intellectual property politics and the private international law of copyright ownership’ 30 (2005) *Brook. J. INT’L L.* 921 (hereafter referred to as Austin, 2005).

interest is in what is protected¹⁹⁹. Ownership rules are about who benefit from the copyright in the work, these rules have less to do with the work's availability to the public²⁰⁰. Moreover, Dr. Van Eechoud has a personal interpretation for the French Court's decision in the *Hutson*²⁰¹ case. Her opinion is that the *lex protectionis* is not applied by French courts to question of initial ownership. This is because the French courts had to find a way out to explain applying French law in the *Hutson* case by referring to public policy rules or priority rules. Meaning, the French law was not the default law to be applied²⁰². Her view is that the law of the habitual residence of the author (the actual creator of the work) should be applied to determine ownership for authors as well as for performers²⁰³.

¹⁹⁹ Eechoud, 2005, pp 293-295. It is worth pointing out that the public may not have an interest in knowing who the copyright owner is but they do have an interest in the attribution right since it helps managing intellectual works through index, bibliographies...etc. see Bently and Sherman, 2004, p 234, in addition, the economic reasoning for recognizing who the author is, is also based on a similar analysis to the function of trademarks see William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property law* (The Belknap Press, London 2003) 61-66 (hereafter referred to as Landes and Posner, 2003). On the same point see Brett Cottle, 'The Problem of legislating to protect moral rights: a personal comment' in Peter Anderson & David Saunders (eds), *Moral rights Protection in a Copyright System* (Institute for Cultural Policy Studies, Griffith University 1992) 106 (hereafter referred to as Cottle, 1992), also Julien, 2002, p 8.

²⁰⁰ However, the link between copyright ownership and domestic sovereignty could trigger ideological and practical concerns that may be invoked when foreign legal principles might override domestic policy choices, Austin, 2005, Brook. J. INT'L L. 917.

²⁰¹ *Turner Entertainment Company v Huston* (1991) 149 RIDA 197, the case will be discussed in details in chapter IV of Part 3.

²⁰² Eechoud, 2005, pp 290-292.

²⁰³ Eechoud, 2003, p 181.

a. Rome II²⁰⁴

Rome II Regulation was enacted on 11 July 2007 and came into force from 11 Jan 2009. This Regulation governs non – contractual obligations²⁰⁵. Its objective is to increase legal certainty in the Union and to facilitate mutual recognition of judgments²⁰⁶.

There is nothing in the Regulation that deals with initial ownership. ‘The law of the country for which protection is claimed’ is a rule that is adopted in art 8 of

²⁰⁴ The Statutory instruments implementing the Regulation in England, Wales and Northern Ireland is No 2986, Private International Law – The Law Applicable to Non-Contractual Obligations Regulations 2008. Rome II applies from 11 January 2009. This provision combined with art 31 means that events giving rise to damage after 19th Aug 2007 will be subject to the regulation if proceedings commenced on or after 11 Jan 2009 see Ministry of Justice, ‘Guidance on the law applicable to non – contractual obligations (Rome II) outline of the main provisions’ (9 Feb 2008), p 13 para 38. For a summary on the background of the Rome II see Mireille van Eechoud , ‘The Position of Broadcasters and Other Media under Rome II Proposed EC Regulation on the Law Applicable to Non-contractual Obligations’ (2006) IRIS plus, No. 2006/10 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=973774> Last accessed 16 Sep 2012, pp2-3 (hereafter referred to as Eechoud , 2006), Clarkson and Hill, 2006, pp 247-249, also Peter Stone, ‘The Rome II Regulation on choice of law in tort’ (2007) 4 Ankara Law Review 95, 130 (hereafter referred to as Stone, 2007).

²⁰⁵ Excluded subject matters form Rome II will be governed by domestic PIL rules i.e. defamation will be governed by common law rules and issues in violation of privacy proceedings will be subject to the provisions of the Miscellaneous Act 1995, Ministry of Justice, ‘Guidance on the law applicable to non – contractual obligations (Rome II) outline of the main provisions’ (9 Feb 2008), p 4 para 5.

²⁰⁶ European Union Committee, ‘Rome II Regulation: Report with evidence’ HL (2003-04) 66 <<http://www.publications.parliament.uk/pa/ld200304/ldselect/lddeucom/66/66.pdf>> last accessed 15 Sep 2012, p 11 para 17. As expressed by the Commissioner for Justice and Home Affairs, Antonio Vitorino, who said “I am pleased to see this proposal—which, by its nature, affects every European citizen and business— finally adopted. There can be no real European area of justice if in such important matters the outcome of a dispute would vary considerable depending on which national court is seised of the matter.” Mentioned in paragraph 8 of the report. Also see Rome II recital 1 and 6.

the Regulation only in relation to IP infringement. The issue of initial ownership is therefore, not covered under the Regulation.

b. Art 3:201 of CLIP Principles

Art 3:201 deals with initial ownership. According to its first paragraph, the law applicable to initial ownership including authorship of a copyrighted work is the law of the country for which protection is sought. The second paragraph of the same article permits deviation from *lex protectionis* rule if the situation is more closely connected to another State²⁰⁷.

c. Art 3:13 of ALI Principles

The ALI Principles suggest in art 313 to apply the law of the creator's residence at the time the subject matter was created to determine the initial title to IP rights that do not arise out of registration. Hence, the initial owner of a copyrighted work is to be determined according to the law of the creator's residence at the time the subject matter was created, provided that the situation concerns a single creator.

However, if there is more than one creator then the applicable law will be that designated by a contract concluded between the creators. If no such contract existed, then the applicable law will be the law of the country where the majority of creators resided at the time of creation of the subject matter. If none of the

²⁰⁷ Para 2 of the same article reads: 'if the situation has a close connection with another State that has a work made for hire provision or deems a transfer or exclusive license of all economic rights in the work to have taken place by virtue of the parties' contractual relationship, effect may be given to such rules by constructing the parties' relationship under the law applicable according to paragraph 1 as involving a transfer or exclusive license of all economic rights in the work'.

above applied, then the law of the State with the closest connection to the first exploitation of the subject matter.²⁰⁸

2. Authorship:

None of the copyright treaties including the BC and TRIPs define the term ‘author’²⁰⁹. Dr. Van Eechoud suggests replacing the term author with the term ‘actual creator of the work’. Her justification is that the latter is a more factual definition whereas ‘author’ is a legal definition²¹⁰. Some argue that authorship as a concept needs to be revisited, this is because the new means of technology and communicative development allow people to write stories together, interact and create a joint art works that are subject to copyright protection. The result is large number of potential “creators” and hence different understanding for the traditional concept of authors²¹¹.

As a general rule, whoever creates the work holds its copyright ownership²¹². However, as one is entitled to dispose of his economic right through assignment and licence, the copyright owner could end up being different from the actual creator of the work. Only the author of a work has the right to enforce moral

²⁰⁸ Art 313 ALI Principles.

²⁰⁹ For the status of authorship and the difficulty courts face while trying to define it in the US, see Mary LaFrance, ‘Who is an Author?’ in Peter K. Yu (ed), *Intellectual Property and Information Wealth: issues and practices in the digital age* (Vol 1, Praeger Publishers, USA 2007) 53-67 (hereafter referred to as LaFrance, 2007).

²¹⁰ Eechoud, 2003, p 181.

²¹¹ Guy Pessach, ' The author's moral right of integrity in cyberspace - a preliminary normative framework' [2003] IIC 262-263 (hereafter referred to as Pessach, 2003).

²¹² For example CDPA 1988 – s 11(1).

rights, and since the author of the work and its copyright owner may differ, one can clearly see the importance of differentiating between the two.

Generally, the nominated applicable laws to determine authorship are *lex protectionis* and *lex originis*.²¹³ Those in favour of applying *lex protectionis* suggest doing so for purposes of consistency. This is true since the same law is applied for most other purposes²¹⁴.

Professor Torremans argues that although the application of the law of the protecting country to determine authorship allows taking the public policy issue into account, one should note that art 5(3) BC provides no clear choice-of-law rule in this case. There are other issues in relation to this point that need to be kept in mind besides the public policy consideration²¹⁵. Professor Torremans argues that if one seeks to have a consistent definition of the term 'author' no matter how many borders the work crosses, one should apply the law of the country of origin (*lex originis*)²¹⁶. However, he clarifies that this might not be the best approach since there is difficulty in defining the term country of origin²¹⁷. In addition, some argued that the application of *lex originis* should be rejected since this law is only referred to in exceptional cases²¹⁸.

Professor Torremans alternative solution is to apply the law of the centre of main interests to determine authorship for unpublished works. He refers to the "centre of main interests" of the person who created the work, and favours the use of this

²¹³ There is no choice-of-law rule in the Bahraini PIL provisions to decide which law is applicable to determine authorship. Thus, once again, one has to refer back to the general principles.

²¹⁴ In favor of this view Geller, 1995, pp 358, 360-361.

²¹⁵ Torremans, 'Authorship, ownership', 2005, E.I.P.R. 220.

²¹⁶ Torremans, 'Authorship, ownership', 2005, E.I.P.R. 222.

²¹⁷ Torremans, 'Authorship, ownership', 2005, E.I.P.R. 221.

²¹⁸ Mentioned in Geller, 1995, pp 360-361.

connecting factor over the use of the habitual residence to avoid the legally defined concepts:

... that require the application of the applicable law which one is trying to identify. Both first publication and the centre of main interests are more precise tools to identify a close or the closest connection between the work and its creation in terms of authorship on the one hand and the applicable law on the other hand.²¹⁹

a. Rome II:

Nothing in the Regulation deals with the issue of authorship. Hence, no guidance is provided when it comes to determining which law decides who the 'author' of the work is.

b. Art 3:201 of CLIP Principles

The issue of applicable law to authorship is dealt with in CLIP along with the issue of initial ownership. Art 3:201 adopts the rule of *lex protectionis*. Hence, the law applicable to 'initial ownership *including in particular authorship* of a copyrighted work' [emphasis added] is the law of the country for which protection is sought.

c. ALI Principles

ALI Principles do not cover question of authorship. Only question of initial ownership is addressed as discussed above. The rule adopted in relation to ownership cannot be assumed to have covered issues of authorship, this is because ownership and authorship are two different concepts that cannot be used

²¹⁹ Torremans, 'Authorship, ownership', 2005, E.I.P.R. 221.

interchangeably. A copyright owner is not necessarily the author or the actual creator of the work.

B. Determining the applicable law to the scope of moral rights:

As the situation stands today, it appears that the application of the *lex loci protectionis* is a must in relation to the content, duration and exceptions to any IP right²²⁰. Only this law can tell how far IP rights can be respected in a territory so that the domestic and international IP users can be aware of permissible uses as well as prohibited ones²²¹.

In relation to moral rights, the situation is not any different. The general rule is that law of the protecting country will determine the scope and duration of these rights.

On the other hand, some commentators argue that if moral rights are accepted as linked to the author's personality right, not part of copyright, then the law of the country of which the author is a national should be applied to the issue of content of moral rights²²². In other words, if moral rights can be seen as part of the personal law of the author, then in copyright terms this could lead to the application of the law of the country of origin because it is closely connected to the author²²³. Dorothee Thum suggests that such approach is a balanced compromise²²⁴. US courts apply French law if French directors are involved, and French courts apply US law if US directors are involved so that in the latter case

²²⁰ Schack, 2009, p 92.

²²¹ Schack, 2009, p 92.

²²² Mentioned in Fawcett and Torremans, 1998, p 502.

²²³ Torremans, 2000, pp 103-105.

²²⁴ Thum, 2005, pp 284-285.

moral rights principles will not be applied²²⁵. She argues that this will be a simple rule that provides for a fair loss on both sides. Yet, she admits that it is difficult to imagine scholars of both sides accepting it²²⁶. Other writers suggest applying the law of the country of which the author is a national to unpublished works where no country of origin can be determined²²⁷. In any case, the reader should note that the common law tradition which is based on commercial exploitation, will most likely reject applying the author's personal law to issues of moral rights²²⁸.

1. Rome II

Rome II adopts *lex protectionis* in relation to IP infringement. There is no explicit provision that deals with the applicable law in relation to the scope of an IP right. However, the law of the country for which protection is sought needs to identify the scope of protection for an IP right in order to decide whether an infringement has occurred or not. Hence, scope and infringement accordingly are determined according to the same law. This is what the majority of commentators and scholars agree on because the scope of an IP right is a matter that is considered of high importance to the society. Therefore, should be determined according to its laws.

In relation to moral rights, this means that the scope of their protection including their duration will be decided according to the law of the country for which protection is sought.

²²⁵ Thum, 2005, pp 285-286.

²²⁶ Thum, 2005, pp 285-286.

²²⁷ Mentioned in Echoud, 2005, pp 472-473.

²²⁸ Torremans, 2000, pp 103-105.

2. Art 3:102 of CLIP Principles

CLIP clearly adopts *lex protectionis* rule. As art 3:102 states that the law of the country for which protection is sought will determine existence, validity, registration, scope and duration of an IP right. Hence, the scope and duration of moral rights will be determined by the law for which protection is sought.

3. Art 301 of ALI Principles

Art 301 is titled 'Territoriality'. It provides for the application for the law of the State for which protection is sought to determine existence, validity, duration, attributes, infringement and remedies for infringement of non-registered IP rights. Therefore, the scope and termination of moral rights is to be determined according to the law of the State for which protection is sought.

C. Moral rights in cross-border infringement: identifying the applicable choice-of-law rules

Unquestionably, localizing the place of infringement of moral rights is important to identify the competent court. At the same time, the importance of this process is not limited to jurisdiction questions. Rather, localizing the place of infringement is also important to identify the applicable law. Therefore, the need to accurately carry out the localization process requires looking at the single act infringing the right at question. Normally, it will occur in one place that is the place where the tort occurred (*loci delicti*) which in most cases coincides with the place where protection is sought (*loci protectionis*). However, the wrongful act can sometimes be committed in one place while the damage is sustained in another.

In many occasions, there is not enough guidance to help decide when it is accurate to say that a moral right infringement is complete. Dr. Adeney provides a list of the hurdles connected to localization of moral rights infringement. For example, although moral rights are listed under one title, yet they protect different authorial interests in different ways. Identifying the location of

infringement needs to be according to a certain applicable law since national laws differ in their identification of what the scope of each right is and therefore whether an infringement has occurred or not²²⁹. As a result, it is important to bear in mind that better and more precise approach would be to address each moral right on its own.

Infringement of the attribution right occurs where the work was disseminated to the public without identification of the actual creator of the work. Before the work is disseminated to the public there is no infringement of the right²³⁰

The integrity right is infringed in the place where the distorted work was communicated to the public²³¹. The mere possibility of the public to view the work in its distorted form triggers this right even if the defendant was able to prove that no one actually viewed the work.

Violation of the right of disclosure is quite clear. It occurs in the place where the work was disclosed or revealed without the author's consent or where it was disclosed in a form different than that permitted by the author. The tort is not complete unless the work has been made available to the public²³².

²²⁹ Adeney, 2006, p 653.

²³⁰ Hence, if the author's name was omitted in France, yet published without attribution in England, then infringement occurs in England not in France. Supporting this view Adeney, 2006, p 655.

²³¹ CDPA 1988 s 80(3),(4),(6).

²³² Disclosure of the work can easily be understood in the physical world. However, if the defendant chose the internet as a medium of disclosing the author's work, things are not as clear as it is in the physical world. More precisely the concept of 'disclosure' needs to be re-visited. On this particular point David Johnson and David Post believe that there needs to be a separate legal jurisdiction for the online world; the territorially-based sovereigns cannot be applied to cyberspace, cited in Georgios I. Zekos, 'State cyberspace jurisdiction and personal cyberspace jurisdiction' [2007] IJL&IT 5-7 (hereafter referred to as Zekos, 2007). Nevertheless, there is no question that disclosure certainly occurs when the material in question is downloaded. The question however is whether downloading of the author's work is the only way of disclosing it on the internet. Internet users understand that the mere act of browsing the website does not

Taking this brief introduction into consideration, it is interesting to see how cross-border moral rights infringement²³³ has been dealt with in Rome II, CLIP and ALI Principles in traditional scenarios and in satellite and online scenarios.

require the user to download materials, the mere browsing of the website is sufficient to enable users to view the materials. In this writer's view, this in itself amounts to disclosure of the materials to the public. Limiting localization of the place of infringement to either the place of download or upload ignores the actual interest which the right of disclosure aims at protecting. Yet, the question remains whether the users' ability to access the materials on the internet reflects a real connection that would justify application of this place's law.

²³³ In relation to choice-of-law rules applicable to general torts, one usually finds that these rules either state that the applicable law is the law of the place of the wrong or the place of injury or giving the plaintiff the freedom to choose the law favorable to him. In fact, according to Stig Stromholm, a general solution based on comparative analysis would be to give the plaintiff the freedom to choose under what law he prefers to proceed, in addition to that, to give the defendant the right to invoke the provisions of the law of the place of acting, the latter law would be invoked over the harmful act itself and its consequences. This solution is not revolutionary because if the plaintiff preferred to proceed under the law of the place of acting or injury, the defendant will be entitled to prove and invoke defences that are available under *lex loci* (the law of the place of acting or injury). Therefore, the defendant will be able to prove that his act (committed in country A and had effects in country A, B and C) was only wrongful in country A and was legal in B and C hence no tort is committed in the latter two states. See Stig Stromholm, 'The immovable *lex loci delicti* in international copyright law – traditional or rational?' in Jurgen Basedow and others, *Aufbruch nach Europa: 75 Jahre Max - Planck - Institute fur Privatrecht* (Mohr Siebeck, Tübingen 2001) 521 (hereafter referred to as Stromholm, 2001). However, Prof. Morris calls for adopting the proper law of the tort doctrine similar to that applied in relation to contracts, see J.H.C. Morris, 'The proper law of a tort' 64 (1951) Harv. L. Rev. 881-895 (hereafter referred to as Morris, 1951). Nevertheless, it is interesting to note what the German Federal Supreme Court in the *Spielbankaffäre* case clearly expressed as a dictum in relation to this principle where it stated that this rule is not applicable to IP infringement. In the latter cases, *lex loci delicti* only refers to the place where the wrongful act was committed; this is because applying the traditional rule of *lex loci delicti* would break the unity of the copyright regime. This is because the fundamental questions which can be described as 'preliminary' questions relating to existence, validity, scope and content of copyright are governed by the principle of territoriality. Acts violating IP rights are connected with carrying out certain acts regardless of their consequences. Hence it is not possible to give the plaintiff such choice of applying either law because this will be incompatible with the specific character of infringements of such rights; *Spielbankaffäre* case (2 October 1997, GRUR Int. 1998, p. 427) cited in Stromholm, 2001, pp 523-524.

1. Traditional scenarios:

Even if one understands moral rights to be independent from copyright, the fact remains that these rights only come into being through the creation of copyright. Moral rights can only be invoked in relation to copyrighted works and not as independent rights on their own. This fact led some commentators to conclude that the precise content of moral rights, which determines whether an infringement has occurred or not, have to be governed by the law governing the scope of copyright i.e. the law of the protecting country²³⁴. They argue that this application is important for reasons of uniformity so that copyright and moral rights will be subject to the same law²³⁵. In support of their argument, they refer to art 6*bis* (3) BC where it was stated that means of redress of moral rights are governed by the law of the protecting country. According to their opinion, this means that the law applicable to means of redress to moral rights also determines their content²³⁶.

²³⁴ Torremans, 2000, pp 103-105 also see Fawcett and Torremans, 1998, pp 501-502.

²³⁵ Torremans, 2000, pp 103-105 also see Fawcett and Torremans, 1998, pp 502-504.

²³⁶ Fawcett and Torremans, 1998, pp 502-504.

a. Art 8(1) of Rome II

One can argue that PIL rules concerning the applicable law in relation to IP infringement were common before the regulation of the Rome II Regulation. This is because as Professor Kur explains, an estimated 95% of pre Rome II law and practices in EU Member States were in line with applying *lex loci protectionis* to determine the applicable law²³⁷.

Art 8(1) explicitly adopts *lex protectionis* as a choice-of-law rule. This in one way or another puts an end to the debate on whether *lex protectionis* is a choice-of-law rule derived from the national treatment principle or is merely a pre-cited proviso in the BC²³⁸.

Despite the arguments put in favour of Rome II Regulation justifying the need to have harmonized rules in relation to choice-of-law in non – contractual obligations, there were substantial concerns expressed by the witnesses of the 8th report of European Union Committee (HL)²³⁹. Rome II rules are not restricted to situations involving some cross-border or other connection with Union and Member States²⁴⁰. The uniform conflict rules laid down in the Regulation could lead to the designation of the law of any country, including the law of a non-EU

²³⁷ Kur, 2009, p 4.

²³⁸ Kur, 2009, p 5.

²³⁹ Concerns were in relation to issues like leaving key terms in the regulation such as ‘damages’ undefined, add to that whether there is an actual need for such Regulation in the EU. The report concluded however, that ‘the Commission has failed to make out a case for the necessity of Rome II. It has not paid sufficient regard to the views of industry, commerce, the media and legal practitioners. It has not demonstrated that Rome II is within the legislative competences exercisable under the Treaty’; see European Union Committee, ‘Rome II Regulation: Report with evidence’ HL (2003-04)66. <<http://www.publications.parliament.uk/pa/ld200304/ldselect/lducom/66/66.pdf>> last accessed 16 Sep 2012, p 6.

²⁴⁰ The principle of ‘universal application’ of the regulation was given under article 3 similar to art 2 Rome I.

country as the applicable law. This approach however, was not welcomed by the House of Lord's report as clearly stated in paragraph 70:

...We do not believe that the mere fact that a party may be sued in a Member State or that the circumstances of the case may involve an EU citizen is sufficient to give the Union legislative competence to determine the relevant conflict rule and, consequently, remove domestic legislative competence. Some connection or relationship between the matter and the functioning of the internal market must be established²⁴¹.

On the other hand, the Commission's Explanatory Memorandum suggests that 'a distinction between intra-Community and extra-Community cases is meaningless. There should be equal treatment for Community litigants "even in situations that are not purely intra-Community" '.²⁴² Several arguments were put to challenge the universal scope, one of which is that not all cases effect the internal European market²⁴³. Others argued in favour of the universal scope of the Regulation, suggesting that it would be difficult on Member States to have

²⁴¹ European Union Committee, 'Rome II Regulation: Report with evidence' HL (2003-04) 66
<<http://www.publications.parliament.uk/pa/ld200304/ldselect/lducom/66/66.pdf>>

Last accessed 16 Sep 2012 , p 23 para 70.

²⁴² European Union Committee, 'Rome II Regulation: Report with evidence' HL (2003-04) 66
<<http://www.publications.parliament.uk/pa/ld200304/ldselect/lducom/66/66.pdf>>

Last accessed 16 Sep 2012, p 29, para 88.

²⁴³ Sir Lawrence Collins put the argument : "For [the Regulation] to be limited to cases arising in [Member] States would not only be very difficult (and perhaps impossible) to formulate with the requisite degree of precision, but would also introduce further enormous complications into an area of law which requires comprehensible simplification" European Union Committee, 'Rome II Regulation: Report with evidence' HL (2003-04) 66
<<http://www.publications.parliament.uk/pa/ld200304/ldselect/lducom/66/66.pdf>>

last accessed 16 Sep 2012, p 29, para 88.

two regimes of conflict of laws, one to be applied on EU cases and the other on international cases²⁴⁴.

Article 8 contains a special rule relating to the infringement of intellectual property rights²⁴⁵. It adopts the ‘universally acknowledged principle of the *lex loci protectionis*’²⁴⁶. This rule – as the Commission explains – is derived from the 19th century version of the Berne and Paris Conventions²⁴⁷. The application of this rule allows each State to apply its own law to enforcement of IP rights which may be validly asserted there.

Note that parties are not allowed to derogate from this rule by an agreement and therefore art 14 does not apply in relation to IP rights.

The Commission stated in its Explanatory Memorandum that the treatment of IP was one that ‘came in for intense debate’ during the consultations²⁴⁸. Mr.

²⁴⁴ European Union Committee, ‘Rome II Regulation: Report with evidence’ HL (2003-04) 66 <<http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcom/66/66.pdf>>

last accessed 16 Sep 2009 [89]. Also, on the arguments for and against the universal scope of Rome II see Eechoud , 2006, pp 3-4.

²⁴⁵ According to Recital (26) the term intellectual property rights means copyright, related rights, *sui generis* rights for the protection of databases and industrial property rights.

²⁴⁶ Rome II Regulation – recital (26).

²⁴⁷ European Union Committee, ‘Rome II Regulation: Report with evidence’ HL (2003-04) 66 <<http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcom/66/66.pdf>> last accessed 16 Sep 2012, p 15 para 34; also Eechoud , 2006, pp 8-9.

²⁴⁸ The problems associated with article 8 are: 1- its relation with article 5 which deals with unfair competition which may arise in conjunction with IP infringement. 2- Whether the rule stipulated in art 8 is the appropriate rule; European Union Committee, ‘Rome II Regulation: Report with evidence’ HL (2003-04) 66 <<http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcom/66/66.pdf>>

last accessed 16 Sep 2012, p 41 para 137.

Fentiman was critical of Article 8²⁴⁹. He doubted whether the special rule being proposed was better than the general rules in Article 3. He argued that infringement of IP rights should not be addressed on their own. Issues of ownership and transfer of IP have to be addressed along with the issue of infringement. In his view, the adoption of the *lex protectionis* without qualification was not, as the Commission suggested, to take an unexceptionable position²⁵⁰.

b. Art 3:601 of CLIP Principles

In relation to the applicable law to IP infringement, CLIP adopts *Lex protectionis* (the law of each state for which protection is sought)²⁵¹. Thus, adopting the same rule applied in art 8 of the Rome II Regulation.

c. Art 301 of ALI Principles

These Principles follow the same rule adopted by Rome II and CLIP. The law of the state for which protection is sought will determine whether an infringement has occurred or not and will further determine the remedies for the

²⁴⁹ Dr. Van Eechoud argues that it is unlikely that Rome II will put IP holders in a better position, Eechoud, 2006, p11.

²⁵⁰ European Union Committee, 'Rome II Regulation: Report with evidence' HL (2003-04) 66 <<http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcom/66/66.pdf>> last accessed 16 Sep 2012, p 41 para136.

²⁵¹ Art 3:601 (CLIP)

infringement²⁵². As clearly stated by the title of the article along with its comments, this rule is based on the principle of territoriality.

Hence, if England was the country for which protection is claimed, English law (CDPA1988) will determine whether moral rights are infringed or not. The same rule applies even if the country for which protection is claimed was not a Member State. Hence, Bahraini law will be applied according to art 8(1) of the Rome II Regulation if Bahrain was the country for which protection was claimed.

2. Satellite and online scenarios:

Infringement is no longer limited to its traditional sense. As a result of technological development and how the world is increasingly depending on online transactions, infringement over the internet along with cross-border satellite and media scenarios are very relevant.

Question of applicable law becomes more problematic in Satellite and media situations. In these cases, infringement will most likely not be limited to a single country. For example, (A) is a composer who contractually waived all his moral rights. His work – the musical piece he composed- is broadcasted in the UK without identifying him as the author of the musical piece. The broadcast is not limited to the UK, rather is received in 6 European countries including France. In this case, which law applies to determine whether an infringement has occurred or not? Should the law of the country of emission be applied or that of the country of receipt?

Interestingly, The Rome II Parliament Draft dealt with infringement committed over the internet or as a result of satellite or broadcast and advised for application of the law of the country of emission. However, Rome II in its final form did not include any particular provision to deal with infringement over the

²⁵² Art 301 ALI Principles.

internet or as a result of satellite or broadcast. Accordingly, *lex loci protectionis* as a general rule will apply. Commentators such as Mr. Sohn believed that this approach ignored the serious difficulties associated with identifying unlimited number of laws²⁵³.

The effect of the digital age on copyright was the subject of many international treaties, one of the earliest was WCT (1996). As a consequence of the WCT, the Digital Millennium Copyright Act (DMCA) came into existence in 1998²⁵⁴. Recently in Europe, the European Parliament and Council Directive on the harmonisation of certain aspects of Copyright and Related Rights in the Information Society, the “Infosoc Directive” was enacted and implemented in 15 Member States by Dec 22, 2002²⁵⁵.

But what do these treaties do in relation to moral rights? In fact, no attention has been given to moral rights in any international instrument that is concerned with the digital era. WCT said nothing except that it required signatory states to abide by articles 2-6 of BC. WPPT required introducing moral rights for performers for their live aural performances and those fixed in phonograms. Moral rights were not mentioned in the DMCA 1998. Again there is no mention of these rights in the Infosoc Directive. The result was to leave moral rights for Member States to be considered on a national basis based on the assumption that moral rights will not distort the functioning of the internal market²⁵⁶.

²⁵³ In addition to that, this approach was considered inconsistent with the ECJ ruling in Case C-68/93 *Fiona Shevill and Others* according to which the country with closest connection could be understood as the country of the principle place of publication or broadcasting, Kyung – Han Sohn, ‘Rome II and Intellectual Property Infringement’ available online at <<http://www.21coe-win-cls.org/english/activity/pdf/4/32.pdf>> last accessed 15 Sep 2012, p 373 (hereafter referred to as Han Sohn).

²⁵⁴ Waelde and De Souza, 2002, IPQ 267.

²⁵⁵ Waelde and De Souza, 2002, IPQ 267.

²⁵⁶ Waelde and De Souza, 2002, IPQ 268.

In relation to online infringement, the situation reaches its highest level of complexity. This is true because the internet has been described as ‘an inherently cross-border medium’²⁵⁷. The main concern for copyright owners when it comes to the internet is its ‘mobility’. This mobility means that internet sites can easily be located and relocated in short time²⁵⁸. This particular nature raised serious debatable issues on PIL level. These concerns are intensified when one realizes that the internet allows immediate wide dissemination of copyrighted works in as many jurisdictions as the WWW covers. Thus, the relevance of the concept of territoriality in the internet context becomes questionable²⁵⁹. One can come up with an endless list of illustration for the complexity of the matter. For example, an Italian artist who is habitually resident in England, might find a modified version of his work available online with his name attached to it as the artist. The website where the modified version is available can be accessed in most of the countries in the world.

Evidently, identification of the country with the closest connection in relation to online transactions is the ultimate complication. To solve the issue, authors such as Mr. Sohn suggests applying the *lex loci protectionis* combined with the infringer’s residence rule (for example where the publisher or broadcaster has his habitual residence or place of business)²⁶⁰. The infringer’s residence rule is considered to be consistent with the closer connection rule since his residence is one of the most important factors taken into account when determining the closest connection²⁶¹. If the combination of *lex loci protectionis* and the

²⁵⁷ Graham Smith, ‘Here, there or everywhere? Cross-border liability on the internet’ [2007] CTRLR 41 (hereafter referred to as Smith, 2007).

²⁵⁸ Waelde and De Souza, 2002, IPQ 273.

²⁵⁹ Alexander Peukert, ‘Territoriality and Extraterritoriality in Intellectual Property Law’ (2011) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1592263> last accessed 10 Sep 2012, p12 (hereafter referred to as Peukert, 2011).

²⁶⁰ Han Sohn, pp 374-375.

²⁶¹ Han Sohn, pp 374-375.

infringer's residence was not enough, Mr. Sohn suggests applying the law of the country where the work, invention, or other subject of IP has originated from²⁶².

a. Rome II

Nothing in the regulation deals with infringement over the internet. Nevertheless, online infringement is not excluded either hence, the chosen rule remains the same, and *lex loci protectionis* will be applied to internet scenarios.

b. Art 3:603 of CLIP Principles

Art 3:603 deals with ubiquitous infringement. It includes infringements carried out through ubiquitous media such as the internet. In such occasions the applicable law is the law of the state which has the closest connection with the infringement. To determine which state has the closest connection with the infringement, art 3:603 paragraph (2) CLIP lists several factors that should be taken into consideration, in particular:

- a. The infringer's habitual residence
- b. The infringer's principal place of business
- c. The place where substantial activities in furthering of the infringement in its entirety have been carried out
- d. The place where the harm caused by the infringement is substantial in relation to the infringement in its entirety.

²⁶² Han Sohn, pp 374-375.

c. Art 321 of ALI Principles

Art 321 deals with ubiquitous infringement. The article suggests applying the law of the State or States with close connections to the dispute²⁶³. An exemplary list of factors is provided which include the parties' residence and place where their relationship –if any- is centred. Note however, that the term used is 'close' connections not the closest connection. Nevertheless, the subsequent comments on this article deal with it as searching for the law of the State or States with the 'most significant relationship to the dispute' or 'most closely connected..²⁶⁴

Keep in mind that the same article also allows parties to prove any different solution -provided by any of the states covered- from that given under the chosen applicable law to the case as a whole. In such occasion, the court should take into account these differences when determining remedies.

²⁶³ Discussing this article Fiona Rotstein, 'Is there an international intellectual property system? Is there an agreement between states as to what the objectives of intellectual property should be?' [2011] EIPR 3 (hereafter referred to as Rotstein).

²⁶⁴ Comments on art 321 paragraph (b).

Chapter IV

Evaluation and conclusion

.. we must ask whether the past concepts of private international law, which originated in Europe and the United States, can meet the social needs of present-day world and the international life of its society, characterized by revolutionary changes in the political, economic and social spheres after the Second World War. These include primarily the internationalization of production and exchange of goods as well as of the whole life of society to an extent which only recently would have seemed unbelievable...

Pavel Kalensky²⁶⁵

As the situation stands today, moral rights as an element of copyright are subject to Rome I and Rome II Regulations. In relation to contracts, the applicable law according to Rome I Regulation is the law chosen by the parties. In the absence of choice, the law most closely connected to the contract will be applied. This law is presumed to be that of the country where the characteristic performer is habitually resident at the time of the conclusion of the contract. The explicit rules provided for under Rome II are only in relation to infringement. Issues of ownership, authorship and ubiquitous infringement are not clearly addressed in the Regulation.

The influential nature of CLIP and ALI Proposals raise remarkable concerns concerning their proposed rules. These concerns are based on the following reasons²⁶⁶:

²⁶⁵ Pavel Kalensky, *Trends of private international law* (Academia, Prague 1971) 39 (hereafter referred to as Kalensky, 1971).

²⁶⁶ A more detailed examination for these concerns can be found in Matulionyte, 'The law applicable to online copyright', 2011, para 11-15, para 35

1. In relation to *lex loci protectionis*: Unfortunately, the proposed principles of both ALI and CLIP adopt *lex loci protectionis* rule in relation to IP infringement despite coming from different traditions (common and civil law). The Proposals do not provide solutions for the problems associated with *lex loci protectionis*. This comes as a surprise because both proposals were formulated in the time of globalization and harmonization for copyright laws²⁶⁷.

2. The problematic case of ubiquitous infringement: The requirement of ubiquitous infringement could lead to excluding the application of this rule to websites of limited geographical access. These websites are not accessible worldwide, so the question here is whether these websites qualify as ubiquitous conduct? What is clear is that both ALI and CLIP in developing their ubiquitous rule, tried to achieve a balance between territoriality and universality.

3. The equal treatment of IP rights in CLIP: CLIP does not differentiate between registered and non-registered rights. Accordingly, choice-of-law rules applicable to trademarks for example will also be applied to copyright. Furthermore, there is no mention of moral rights in the proposed rules despite coming from European Continental view.

4. Both proposals (CLIP and ALI) suggest applying the law with the closest connection to the dispute. In fact, the ALI proposal uses the term ‘close connection’ not closest unlike the terminology used in CLIP proposal. In any case, the exemplary list of factors under ALI seems to be neutral as to the parties’ role as right holder or infringer. The list given under CLIP is more ‘infringer – oriented’.

5. The provisions of both proposals are very detailed as if they were tailored with a particular example or scenario in mind. This approach in itself avoids simplicity as a desirable quality in PIL rules.

²⁶⁷ Matulionyte, ‘The law applicable to online copyright’, 2011, para 9.

With regard to moral rights, derogation from the existing choice-of-law rules in general, and *lex loci protectionis* in particular, should not be rejected. This is because moral rights are not specifically addressed in Rome I or Rome II Regulation at the first place. What is clearly available is an assumption that moral rights should be attached to copyright in conflict-of-law as a consequence of having them as an element of copyright.

However, the vague present position of moral rights in conflict of laws, together with the special nature of moral rights and the link these rights share with both copyright and personality rights, inspired the research question of this thesis. It is therefore submitted that further exploration and investigation regarding the position of moral rights in conflict-of-laws is needed. Such investigation has to be carried out from alternative views to copyright.

Surely, the task remains challenging. Departing from the territoriality principle and its ideological considerations²⁶⁸ is certainly a hurdle as 'Territoriality remains a powerful intuition...'²⁶⁹. Moreover, territoriality of IP rights was further supported by what is understood as the public character of IP rights. Countries have social, cultural and economical interests in protecting IP rights which make the application of a foreign law a matter of serious concern, more precisely there is a fear of misapplying any foreign law to this delicate area²⁷⁰.

Therefore, scholars recognize and acknowledge the complications of departing from the territoriality principle, which casts its shadow on PIL issues. Professor Schack explains '... Devising adequate conflict rules for unregistered IP rights therefore remains an intellectual challenge for law professors, practitioners and the legislator...' ²⁷¹ Yet, this writer believes that finding specifically designed choice-of-law rules to moral rights is possible '...once the legal mind has been

²⁶⁸ Stromholm, 2001, p 527.

²⁶⁹ Ricketson and Ginsburg, 2006, p 1313.

²⁷⁰ Fentiman, 2005, pp 131-132.

²⁷¹ Schack, 2009, p 96.

freed from the compulsive idea of the exclusive application of the protecting countries' laws²⁷².

Therefore, Part 3 is intended to carry out this attempt and explore the possibility of detaching moral rights from copyright in conflict-of-laws.

²⁷² Schack, 2009, p 96.

Part 3

Detaching Moral Rights from Copyright in Conflict-of-Laws: Exploring Alternatives to Copyright Perspective

The ignored position of moral rights in conflict-of-laws was clearly explored in Part 2. The present choice-of-law rules were designed with copyright in mind but not moral rights. As a result, application of the same choice-of-law rules to moral rights came with certain complications.

Therefore, the theory of detaching moral rights from copyright in conflict-of-laws is worthy of examination. This Part intends to investigate the validity of this theory. It will be divided into 4 chapters. Chapter I is an introduction, it aims at identifying the considerations that triggered the present investigation. Chapter II undertakes the search for stronger association with moral rights in conflict-of-laws. As the theory of moral rights is based on the connection between these rights and general personality rights, Chapter II examines personality rights in conflict-of-laws and their intersection with moral rights from conflict-of-laws perspective.

Subsequently, Chapter III explores the related judicial decisions to the subject. The goal is to cover the most important decisions in international moral rights cases to find out whether moral rights are taken beyond the scope of copyright law or not. Finally, Chapter IV is an assessment and concluding remarks for the findings of Part 3.

Chapter I

Introduction: Identifying the considerations that triggered the present investigation

This Chapter is an answer to why there is an argument for detachment at the first place. It attempts to identify the problems associated with application of *lex loci protectionis* to moral rights, and the difficulties affiliated with having no specific choice-of-law rule to questions of authorship and validity of contractual waiver of moral rights. As this chapter is an introduction it will merely touch on the related judicial decisions, which question the default position of moral rights as an element of copyright in conflict-of-laws. The question of whether courts take the matter beyond the scope of copyright or not will be examined in Chapter IV of this Part.

It is to be noted that particular attention is paid to problems of moral rights in cross-border torts, and the application of *lex loci protectionis* accordingly. This however, does not mean that problems associated with moral rights in cross-border contracts are less important. Yet, the significance of cross-border torts is attributed to the fact that infringement scenarios are more likely to occur. Hence, the number of cross-border infringement cases is expected to be higher and the complexity of these scenarios is expected to be greater.

A. The problematic application of *lex loci protections* to moral rights

There are certain problems associated with the application of *lex loci protectionis*. Some of these problems are inherent in *lex loci protectionis* as a principle. However, other problems are triggered when this rule is combined with moral rights.

The first problem is that *lex loci protectionis* as a rule based on the principle of territoriality, seems to be inconsiderably related to moral rights. From a general perspective, territoriality is an outdated²⁷³ and a substantive law principle²⁷⁴. Territoriality and comity are legal tools used to express the political concerns which form part of sovereignty²⁷⁵. During the territoriality period, IP rights were confined to the geographical borders of the granting country²⁷⁶, in fact, '... as far back as the late nineteenth century the vast majority of intellectual property disputes were wholly domestic in nature: ownership or infringement issues hadn't the potential of reaching the whole world...' ²⁷⁷. Each community lived by its own rules and laws, the law of each country identifies the rights and its effect is only limited to activities undertaken by others within the geographical territory for which it is granted. Some argue that territoriality is a universal

²⁷³ Supporting this view Schack, 2009, pp 87-88.

²⁷⁴ The concept is considered to be ambiguous with scope that is more flexible than expected, Rita Matulionyte, The law applicable to online copyright, 2011, para 3.

²⁷⁵ Austin, 2005, Brook. J. INT'L L. 902.

²⁷⁶ On the territorial framework see Paul Edward Geller, 'International intellectual property, conflict of laws, and internet remedies' in Peter K. Yu (ed), *Intellectual Property and Information Wealth: issues and practices in the digital age* (Vol 4, Praeger Publishers, USA 2007) 243-244 (hereafter referred to as Geller, 2007).

²⁷⁷ Boschiero, no 1.

matter -inherent in the very nature of IP rights itself²⁷⁸. The territoriality of laws enables them to reflect historical, religious, ethnical, social, cultural and economic needs of every community²⁷⁹. Therefore, whether one accepts territoriality as a special characteristic of IP rights or not, territoriality has long been the applicable notion in relation to IP rights including copyright.

Nevertheless, since the post-war, the importance of sovereignty and the principle of territoriality have declined. This is substantially attributed to three important factors. The first factor is the international and regional economic integration which affected the level of regulations from national to transnational. IP rights became part of the global trade relations, and with that came the difficulty for IP to meet the particular needs for every state. Hence, an international and systematic approach to the IP system crystallized in the TRIPs agreement 1994²⁸⁰.

The second factor is the decline in the importance of state's role against the development of the role of other parties such as multinational corporations and intermediaries²⁸¹.

The third and final factor is the ever increasing importance of the internet. As a matter of fact, it is probably agreeable to say that the internet alone has changed the conventional understanding for geographical borders. At the same time, principles and rules that were formulated based on the notion of territoriality – such as copyright law- are also losing this basis. Efforts to harmonize copyright law on the international level started with the BC. The Convention established minimum standards of protection (types of works protected, duration of protection, scope of exceptions and limitations) as well as principles of 'national

²⁷⁸ Fentiman, 2005, pp 139-141.

²⁷⁹ Johnson, DPhil thesis, 2005, p 27.

²⁸⁰ TRIPs "...provides for a number of key objectives as to the operation of the international intellectual property system." Rotstein, 2011, EIPR 1.

²⁸¹ Kono, 2010, p 5.

treatment' and automatic protection for copyright. WCT also contributed to the international development by ensuring copyright protection to computer programs and databases. The importance of TRIPs as an enforcement tool for IP rights including copyright cannot be underestimated. Efforts to harmonize copyright at the European level crystallised in the 2001 InfoSoc Directive which harmonized the rights of reproduction, distribution and communication to the public, as well as the legal protection of technical protection measures and rights management systems across European Union Member States. In addition, there is the 2004 Directive on Enforcement of Intellectual Property Rights (2004/48/EC) which adds extra measures on enforcement of digital copyright. These harmonization attempts, at the regional and international level (in addition to the exponential increase in conflicts involving trans-border elements) brings out the weakness and unsuitability of the principle of territoriality which does not go in harmony with the notion of globalization²⁸², and the concept of borderless market is -by definition- in conflict with the old principle of territoriality in relation to copyright²⁸³.

Nevertheless, art 8(3) Rome II gives priority to territoriality over efficiency and party autonomy by excluding IP rights from the application of rules relating to freedom of choice. The justification is found in recital 26 which explains that private parties should not be allowed to interfere with the sovereign power of the lawmakers to determine the existence, scope and limitation of IP rights

²⁸² Ansgar Ohly, 'Choice of law in the digital environment – problems and possible solutions' in Josef Drexler and Annette Kur (eds), *International Property and Private International Law – Heading for the Future* (Hart Publishing, Oregon 2005) 243-244 (hereafter referred to as Ohly, 2005) also see Torremans, 2000, p 99.

²⁸³ Davis and Garnett, 2010, p 75. The effect of globalization on copyright stands as clear example against the concept of territoriality as Dr. Matulionyte explains that remedies granted in copyright are based on a territorial principle while in practice they have extraterritorial effects. For example a domestic injunction normally leads to shutting down the whole website; an injunction granted under law of country A may prevent conduct that is considered legal under the law of country B. Furthermore, if the conduct was illegal in many countries, and the courts granted damages independently, this could lead to having an overall damage that exceeds the actual harm, see Matulionyte, The law applicable to online copyright, 2011, para 3-6.

according to the universally accepted principle of *lex protectionis*²⁸⁴. However, the situation in relation to moral rights does not necessarily fall within the scope of this justification. The reason is that moral rights are attached to the *person* of the author in relation to his work. Therefore, the balance States try to achieve between public and private interests in relation to IP rights in general is less triggered in relation to moral rights²⁸⁵. This is further supported by the fact that moral rights are unregistered IP rights. Hence, the national legislator only recognizes these rights and does not grant them²⁸⁶. Therefore, application of the principle of territoriality and whatever rules derived from it including *lex loci protectionis* rule should no longer be possible. This is because territoriality was justified in old times when the protecting country coincided with the forum state. However, this is no longer the case as copyright -and IP rights in general- are exploited on a worldwide basis²⁸⁷.

²⁸⁴ Kur, 2009, p 8.

²⁸⁵ Even though moral rights protection forms a restriction on the freedom of the public, this restriction is available in the conscious of the society even in the absence of moral rights legislation. This is likely to be true in any civilized society at least in relation to divulgation and integrity rights. Probably, the situation is best illustrated when one studies societies' attitude towards plagiarism; the verb plagiarize is defined according to the Oxford Dictionary as 'take and use (another's writings etc.) as one's own.' Hence, the essence of plagiarism is very similar to what is protected under the attribution right which is guaranteeing the authenticity of the origin of the work. The ongoing piracy for copyrighted materials could be an indication that societies do not have "ethical" issue when it comes to depriving the copyright owner of his economical benefits. However, the situation is different when it comes to plagiarism as societies find false attribution to be unethical. Therefore, attribution right and sovereignty have a weak connection. The public and the private interest in this matter are very much balanced without the need for an intervention from the local authority.

²⁸⁶ Schack, 2009, p 90.

²⁸⁷ Schack, 2009, p 81.

The second problem concerns the imbalance of interests between authors and users in online copyright cases, as a result of the application of *lex loci protectionis*²⁸⁸. Today, materials uploaded online can be accessed worldwide (with very few exceptions). *Lex loci protectionis* rule gives the author the choice of claiming protection under the most protective law in the case. On the other hand, the defendant in an online case will be sued under any law where the work can be accessed and hence should accommodate his conduct to almost each law worldwide, which leads to legal uncertainty²⁸⁹. This uncertainty in having the defendant subject to as many laws as the www can reach, contradicts with one of the main objectives of conflict-of-laws which is promoting predictability through meeting the parties' legitimate expectations. Consequently, conflict justice will not be achieved.

The third problem is related to the impossibility of applying a single law to online infringements, if *lex loci protectionis* is applied. Rules of conflict-of-laws are created so that only one single law is to be applied out of several potentially applicable laws. Application of a single law to the right holder means that the author acquires worldwide remedies on the basis of a single law. For the defendant, it means eliminating the problem of multi-applicable laws, hence avoiding the danger of cumulative or conflicting remedies granted under different laws²⁹⁰. Application of *lex loci protectionis* prevents us from achieving these desirable results.

For example, a composer (A) has licensed the copyright in his composed musical piece to (B). The licensee (B) authorizes a third party (C) to make major

²⁸⁸ The idea is discussed by Dr. Matulionyte in relation to copyright in general, Matulionyte, The law applicable to online copyright, 2011, para 34. However, its use here is limited to moral rights.

²⁸⁹ Matulionyte, The law applicable to online copyright, 2011, para 4.

²⁹⁰ Matulionyte, The law applicable to online copyright, 2011, para 22.

modifications to the work. The modified version of the work is then uploaded on YouTube with attribution to (A). In this scenario, (A) being the author of the work, finds his integrity right infringed. Almost everyone in the world with internet access can listen to the modified version of work on YouTube. The license has no effect on the moral rights claim because it is only valid in relation to the author's economic rights. Application of *lex loci protectionis* means that the defendant (the licensee – B) is subject to laws of any jurisdiction where YouTube can be accessed.

Another example is that in relation to the attribution and divulgation rights. For example, (A) has been appointed by an organization to prepare a social study. He prepared the study through undertaking several social and economical studies in addition to translating plenty of reports. He then hands the study over to the organization. At a later stage, (A) found out that the study was published in two forms: hardcopy (book) in 3 European countries, and softcopy (as selected social studies) online. In both forms of publication, the author's name was omitted and the name of the manager of the organization was inserted as the name of the author of the work. The author, in his contract with the organization, has agreed on publishing the work in its hardcopy format, but not as selective social studies online.²⁹¹.

The organization has infringed the author's attribution right as well as his divulgation right. If the author was to bring a case against the organization, the applicable laws would be laws of 3 different European countries in relation to infringement of his attribution right, and laws of as many jurisdictions as the web can reach in relation to the selected social studies published online.

B. Inadequate present discussion on authorship and validity of contractual waiver of moral rights in conflict-of-laws

As explained earlier in Part 2, there is no clear choice-of-law rule applicable to questions of authorship and validity of contractual waiver of moral rights. The

²⁹¹ Facts are based on case called ' Theatre for life' which was brought before Khartoum court of summary justice / civilian case 1337 for the year 1998 on 16th Nov 1999.

absence of specifically designed choice-of-law rules to be applied to these two important questions, leads to complications. Application of *lex loci protectionis* rule to question of authorship cannot be accepted, as it leads to identification of a different author, each time the work crosses the border. At the same time, *lex originis* does not solve the problem as there is no consensus regarding where the country of origin is, especially for works that were first published online.

As for the topic of contractual waiver of moral rights, the main issue is related to the validity of waiver. This is of particular importance because of the well known differences between the two legal traditions. As the situation stands today, the question is not specifically addressed. Moreover, if one was to apply the general choice-of-law rule under Rome I, the applicable law would be that of the contract *if* the clause or term at question was valid i.e. the law chosen by the parties or in absence of expressed choice, the law of the place of habitual residence of the characteristic performer of the contract. This solution is generally refused because validity is a matter that is in essence related to existence of moral rights.

Finally, the use of the internet and 'online' services today is more of a necessity than a luxury²⁹². Litigations are therefore expected to increase, in their number and complexity. This expectation does not find a comforting reality in the light of the problematic application of *lex loci protectionis*, or the insufficient present discussion on authorship and validity of contractual waiver of moral rights in conflict-of-laws.

²⁹² In fact, the French Constitutional Council considered internet access to be 'fundamental human right'. The result was that internet access could only be cancelled by a court's decision, accordingly the French HADOPI law concerning promotion and distribution of creative works on the internet was rendered useless in essence. For detailed legislative comment on the HADOPI law see Alexandre Entraygues, 'Legislative comment: The Hadopi law – new French rules for creation on the internet' [2009] Ent.L.R. 264 – 266 (hereafter referred to as Entraygues, 2009)

C. The judicial tendency towards attaching moral rights to general personality rights in conflict -of-laws²⁹³

There are limited, yet important judicial decisions in relation to moral rights in conflict-of-laws. Courts' decisions in cross-border moral rights cases gave rise to a new query as courts seem to bend the rules for reasons beyond the scope of copyright.

The most famous example is *John Huston* case which has been heavily discussed and reviewed. In this case, the French Court de Cassation considered moral rights to be of 'mandatory application'. Laws that provide lower standard of moral rights protection will not be applied even if the infringement concerns moral rights of foreign authors and foreign works as long as the protection sought for is in France. The tendency found in the French court's ruling in the *John Huston* case, is also found in other judgments. This is not limited to civil law tradition. Rather, some decisions given by common law courts approve the link between moral rights and general personality rights in conflict-of-laws. Thus, courts seem to be taking moral rights, beyond the scope of 'copyright' in conflict-of-laws.

²⁹³ Note that this is *only* an introduction to this issue which will be examined in details in chapter IV of this part. It suffices here to mention this point to keep the reader's train of thought steered in the right direction.

Chapter II

The search for stronger association with moral rights in conflict-of-laws:

General personality rights

The development of moral rights was greatly influenced by the personalist ideas. This draws instant attention to general personality rights. From civil law perspective – more specifically French law- the personality character is obviously reflected in moral rights, this is because to meet the originality standard, one's *personality* has to be reflected in his literary or artistic creation²⁹⁴. The individuality and the unique character each adds to his work, is a reflection of his own personality²⁹⁵. As Professor Kwall puts it: 'The essence of a moral rights injury lies in its assault upon the author's personality, as that personality is embodied in the fruits of her creation'²⁹⁶

Therefore, there is strong supporting argument, that general personality rights and moral rights are purposely similar. Still, some might argue that, there is nothing titled as general personality rights in common law tradition. Yet, it does

²⁹⁴ Gunner W.G. Karnell, 'The Berne Convention between authors' rights and copyright economics – an international dilemma' [1995] IIC 209-210 (hereafter referred to as Karnell, 1995); Bouche, 2011, p 64.

²⁹⁵ On this point see Andre Bertrand, 'Shostakovich and John Huston: The French Supreme Court on Copyright, Contracts and Moral rights' in Christopher Heath and Anselm Kamperman Sanders (eds), *Landmark Intellectual Property Cases and Their Legacy: IEEM International Intellectual Property Conferences* (Kluwer Law International, The Netherlands 2011) 1 (hereafter referred to as Bertrand, 2011).

²⁹⁶ Roberta Rosenthal Kwall, 'Authors-stories: narrative's implications for moral rights and copyright's joint authorship doctrine' [2001] Southern California Law Review available online at <<http://ssrn.com/abstract=844186>> last accessed 20 Sep 2012, p 7 (fn 102) (hereafter referred to as Kwall, 'Authors-stories', 2001). More on the special relationship between authors and their works see Zemer, 2012, pp 132-135. The rise of Romantic Movement in fields like literature, music, drama...etc. led to understanding creativity as personality and therefore -post to the Revolution- copying someone else's work was translated as impairing his personality, Landes and Posner, 2003, pp 63-64.

not change the fact that *the essence* of general personality rights remains protected there. This is true even with regard to the judicial decisions, from common law courts, on the subject.

Therefore, the goal in this chapter is to understand personality rights as the field most closely connected to moral rights. Examination will be from conflict-of-laws perspective to see how these rights are treated in cross-border disputes. Exploring general personality rights, as an alternative perspective, is expected to contribute to the process of evaluating the accuracy of the related choice-of-law rules.

This chapter shall accordingly cover the following:

- Definition and characteristics of personality rights
- The position of general personality rights in Rome II Regulation and in the UK.
- The intersection between moral rights and general personality rights with relation to their purpose and function.
- Case law illustrating the difficulty in identifying a clear line between the two subjects.

A. Introduction:

1. Introducing personality rights

a. Definition and characteristics:

The concept of personality rights is a civil law concept²⁹⁷. The German and the Swiss were the first to use the word '*Personlichkeitsrecht*'²⁹⁸ during the 19th and 20th centuries. However, the current use of the term 'personality rights' has emerged in the middle of the 20th century. These rights came to form in 1954, since then all French law treaties and handbooks include a specific chapter on personality rights²⁹⁹. On the other hand, rights of personality remain undefined in common law tradition, yet considered as a subset of torts. These rights could include one's right in privacy, one's right against false statements to others and against misuse of one's image. The difference between common and civil law

²⁹⁷ The first law review on personality rights in France was in 1909 written by H.E. Perreau; see Adrian Popovici, 'Personality rights – a civil law concept' 50 (2004) *Loy. L. Rev.* 351 (hereafter referred to as Popovici, 2004). For more details on personality rights in Germany see Gert Bruggemeier, 'Protection of personality rights in the law of delict / torts in Europe: mapping out paradigms' in Gert Bruggemeier Aurelia Colombi Ciacchi and Patrick O'Callaghan (eds), *Personality rights in European tort law* (Cambridge University Press, Cambridge 2010) 18-25 (hereafter referred to as Bruggemeier, 2010).

²⁹⁸ The German term is cited in Popovici, 2004, *Loy. L. Rev.* 351.

²⁹⁹ Popovici, 2004, *Loy. L. Rev.* 351.

traditions in relation to personality rights, is reflected in the EU tort law³⁰⁰ where there is no uniformity concerning personality rights³⁰¹.

Although scholars agree on the importance of personality rights, there is no consensus concerning the content of these rights³⁰². Nevertheless, several definitions were proposed. The aim was to determine the content and scope of these rights.

Under French law for example, personality rights are: '... fundamental rights attached to the persona of the human being, intended to protect non-patrimonial attributes or manifestations of the person.'³⁰³

Perreau gave a comprehensive definition for the *droits de la personnalite* published in his famous article (1909). He defines these rights as:

rights of the person as such, comprising the right to be recognized as a distinct individual – expressed, in positive law, by a person's exclusive right to his name and the actions pertaining thereto, the right to one's own likeness and the rights to honour and liberty, *i.a.* the liberty to organize one's private life. Secondly, there are rights inherent in the person as member of a family: rights concerning legitimacy, marital

³⁰⁰ For essays and reports on European tort law, see Helmut Koziol and Barbara C. Steininger (eds), *Tort and Insurance law yearbook: European Tort Law 2001* (Springer Publication, Austria 2002) (hereafter referred to as Koziol and Steininger, 2002).

³⁰¹ Eric Engle, 'Harmonisation of rights of privacy and personality in the European Union' [2005] London Law Review 215-240 available online <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1335084> last accessed 2 Sep 2012, p 3 (hereafter referred to as Engle, 2005).

³⁰² Popovici, 2004, Loy. L. Rev. 351-352.

³⁰³ Definition cited by Stephen Boyd, 'Does English law recognize the concept of an image or personality right?' [2002] Ent.L.R. 4 (hereafter referred to as Boyd, 2002). Whereas according to the German Federal Constitutional Court, the right of personality is intended to 'secure the closer personal sphere of life and the maintenance of its basic conditions' cited in Paul M. Schwartz and Karl-Nikolaus Peifer, 'Prosser's Privacy and the German right of personality: Are four privacy torts better than one unitary concept?' [2010] California Law Review volume 98, 1925-1988 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1816885> last accessed 30 Oct 2012, p 1933 (hereafter referred to as Schwartz and Peifer, 2010).

status, etc. and rights to the family name. Finally, there are rights attached to the status of citizen: national-ity, right to vote, etc.³⁰⁴

Others define it as:

A right to personality is the exclusive intellectual property right of each person to use his or her own name, image, voice, signature, and any other distinguishing characteristics which would identify a specific person. Unlike a publicity right, a personality right is not a financial right but rather a personal intellectual property right which, strictly speaking, is not inheritable or assignable³⁰⁵.

Whereas Professor Damich defines personality rights as 'those individualizing traits of a man which constitute his singularity and differentiate him from all other human beings: in this sense it is a reification of the concept of identity'³⁰⁶

As for the characteristics of personality rights, scholars seem to agree that these rights are extra-patrimonial i.e. do not have economic value³⁰⁷, not transferable, may not be prescribed, exempt from seizure and cannot be renounced or abdicated because they are essential attributes of the person³⁰⁸.

³⁰⁴ Stig Stromholm, *Right of privacy and rights of the personality: a comparative survey* (P.A. Norstedt & Soners Forlag, Stockholm 1967) 49-50 (hereafter referred to as Stromholm, 1967).

³⁰⁵ Robyn Durie, 'United Kingdom: International privacy, publicity and personality laws' in Michael Henry (ed), *International privacy, publicity and personality laws* (Butterworths, London 2001) 449 (hereafter referred to as Durie, 2001).

³⁰⁶ Damich, 1988, Ga. L. Rev. pp 28-29.

³⁰⁷ Perreau in the 20th century considered rights concerning moral personality (as opposite to physical) to include honour, liberty and intellectual works (moral rights). These rights as he explained could not have a monetary value and thus were inalienable, imprescriptible and inheritable and can only be exercised by the owner, Bruggemeier, 2010, pp 13-14

³⁰⁸ Discussed in Popovici, 2004, Loy. L. Rev. 353.

b. Interests these rights aim at protecting:

Personality rights are intended to provide the maximum level of protection to the attributes of the human person. A natural person automatically qualifies for protection under personality rights by the mere fact of his existence, no additional requirement is needed³⁰⁹. An interest that is characterized as an attribute of the human person is considered part of personality rights. Hence, such attributes certainly include one's right in his life, honour, privacy³¹⁰, reputation, name, expression... etc.

French legal writers stress the impossibility of making an exhaustive list of the rights of personality. Nevertheless, they agree that personality rights are divided into 3 groups. The first group is rights to the constitutive elements of the person (bodily integrity, honour and reputation). The second group is rights to the means of identification or expression (one's name and likeness, the right of secrecy and moral rights of authors). The third group concerns rights to freedom of movement and work³¹¹.

Therefore, the French classification of authors' moral rights as part of general personality rights is undisputed. The essence of what is protected under privacy, reputation, honour and name (as attributes of the human person) is also protected under paternity, integrity and divulgation rights (as part of author's moral rights)³¹².

³⁰⁹ Hence the focus is on the 'being' of the person as in contrast with the 'having' of the person, Popovici, 2004, Loy. L. Rev. 352.

³¹⁰ On the economics of privacy see Richard A. Posner, 'The 1978 James McCormick Mitchell lecture: privacy, secrecy, and reputation' 28 (1978) Buff. L. Rev. 1-55 (hereafter referred to as Posner, 1978).

³¹¹ Stromholm, 1967, p 53.

³¹² This point will be thoroughly examined in chapter 3 of this part.

c. The position of general personality rights in the UK:

Historically, the notion of privacy – as an attribute of the human person- in the Anglo-American legal writings, finds its roots in the most significant law review article, and probably the most influential on the notion of privacy, which was written by Samuel D. Warren and Loius Brandeis (two American lawyers) in 1890. This article was written as an action against the violation to Samuel D. Warren family life by what was known then as the 'yellow press'. The authors stressed the importance of protecting private life. They supported their argument by decisions given by American and English courts where intrusion on the private sphere of one's life was held actionable. The authors stated that if these decisions were to be analyzed properly, then we will find that what these decisions really protected was in essence a right of privacy and it was time to recognize it³¹³. Yet, in a later stage in their article, they called for replacing the right to privacy with a general right to one's personality. Nevertheless, what they mean by the right of personality remained unclear³¹⁴.

Warren and Brandies referred in their article to the very famous English decision of *Prince Albert v Strange* (1849)³¹⁵, understood to be the first ever ruling recognizing one's right in his own picture³¹⁶ and where Vice Chancellor Knight Bruce clearly mentioned the term 'privacy'. Yet, the fact remains that it is very difficult in the English – as well as in the American- legal system to point out the exact moment or decision that gave birth to the right of privacy as distinct from other interest protected by actions. In other words, in English law there is

³¹³ Stromholm, 1967, p 25.

³¹⁴ Schwartz and Peifer, 2010, p 1944.

³¹⁵ (1849) 1 Mac & G 25

³¹⁶ Bruggemeier, 2010, pp 25-26.

no story of birth '...of privacy as an element of positive law...' ³¹⁷. As for the theoretical basis for general personality rights in the UK, it is based on a mixture of property and human right principles ³¹⁸.

The term 'general personality rights' is not recognized in the UK, nevertheless, protection is still provided for personality rights interests in piecemeal fashion ³¹⁹. Usually, reference is made to defamation ³²⁰, breach of confidence ³²¹, passing off ³²² and liable as the torts used to protect these interests ³²³.

³¹⁷ Stromholm, 1967, p 26. In English law there hasn't been a birth point in order to measure growth, English developments can be seen as 'birth pangs'. Stromholm, 1967, p 34.

³¹⁸ Thorsten Lauterbach, 'US – style 'personality' right in the UK – *en route* from Strasbourg?' 20th BILETA conference – Queen's University of Belfast (April, 2005) Published online at <<http://www.bileta.ac.uk/content/files/conference%20papers/2005/US-style%20Personality%20Right%20in%20the%20UK%20En%20Route%20From%20Strasbourg.pdf>> last accessed 26 Sep 2012, pp 8-9 (hereafter referred to as Lauterbach, 2005).

³¹⁹ Gert Bruggemeier, Aurelia Colombi Ciacchi and Patrick O'Callaghan (eds), *Personality rights in European tort law* (Cambridge University Press, Cambridge 2010) 3-4 (hereafter referred to as Bruggemeier, Ciacchi and O'Callaghan, 2010).

³²⁰ 'Defamation is defined as "Protection against non-corporal injuries to one's person". There are two types of defamation, slander and libel. Both have common elements, namely an untrue statement which causes injury leading to damages. To give rise to a cause of action the defamatory statement must be communicated to a third party (i.e. someone other than the tortfeasor and his or her victim).' Engle, 2005, p16.

³²¹ Some could see an overlap between privacy and confidentiality. However, privacy and confidentiality are two distinct and separate concepts. Privacy is 'concerned with the ability to control the dissemination of information about a person, regardless of how that information came to be known by the disseminator'. On the other hand, Confidentiality concerns 'both the nature of the information and the circumstances under which that information was communicated', Alexandra Sims, 'A shift in the center of gravity: the dangers of protecting privacy through breach of confidence' [2005] IPQ 51 (hereafter referred to as Sims, 2005). It is worth pointing out the problems associated with using breach of confidence to protect privacy: 'These problems arise from the extended form of breach of confidence jettisoning the requirements that the information must have the necessary quality of confidence about it and that it must be

Even this minimal and piecemeal level of protection for these interests is regarded by some commentators as sufficient to state that personality rights are now recognized in the UK. Mr. Gert Bruggemeier argues that personality rights do exist in the UK because Privacy and self – determination are now considered with no doubt a European feature, being part of the ECHR and part of the jurisprudence of the ECtHR and the established case law of the ECJ 'on community fundamental rights, which are already in force as general principles of EC law'³²⁴.

Moreover, a larger group of commentators³²⁵ believe that '... the English Parliament in passing the Human Rights Act condoned a move towards a greater protection of privacy under the common law.'³²⁶ Therefore, enforcement of the Human Rights Act in 1998 marks an explicit move into recognizing personality

imparted in circumstances importing an obligation of confidence', for more details see Sims, 2005, IPQ 44-49.

³²² Passing off is an action used to prevent 'misrepresentation by the defendant leading to confusion (or deception) and causing damage to the goodwill acquired by the plaintiff in his goods, name, marks, etc.', Barajas, 2009, Ent. L.R. 257.

³²³ Defamation and breach of confidence are more in use when the dignity interest is at stake; Aldo De Landa Barajas, 'Personality rights in the United States and the United Kingdom – is Vanna too much? Is Irvine not enough?' [2009] Ent. L.R. 256 (hereafter referred to as Barajas, 2009) Bruggemeier, 2010, p 8. For more details see Personality right in United Kingdom – An introduction Published on the Personality Rights Database - based on the School of Law , University of Edinburgh available online: <<http://www.law.ed.ac.uk/ahrc/personality/uk.asp> > last accessed 27 September 2012.

³²⁴ Bruggemeier, 2010, p 3.

³²⁵ See for example Charlotte Waelde, 'Marilyn Monroe, Posh Spice and Me: Personality, Property and Privacy' available online at: <<http://www.era.lib.ed.ac.uk/bitstream/1842/2293/1/marilynmonroeposhspiceandme.pdf>> last accessed 30 Sep 2012 (hereafter referred to as Waelde, 'Marilyn Monroe, Posh Spice and Me').

³²⁶ Sims, 2005, IPQ 32.

rights in England. As a result, courts in the UK are ought to act in a manner that is compatible with the ECHR³²⁷.

With regard to case law, *Douglas v Hello!*³²⁸ is significantly important in relation to the question of personality rights in the UK. The case has been described by Sedley LJ as marking the arrival of the right of privacy in England: '[W]e have reached a point at which it can be said with confidence that the law recognizes and will appropriately protect a right of personal privacy'³²⁹

According to Stephen Boyd, *Douglas v. Hello!* marks the first step towards recognizing privacy right in the UK. Yet, the court's ruling in this case provides little support for recognizing general personality rights³³⁰. This is because the UK under ECHR was expected to develop the law of tort and delict to create new privacy right. However, the Lords have not taken this approach and instead, existing causes of action, in particular breach of confidence has been manipulated to protect privacy interests³³¹. Another two recent decisions by the House of Lords also prove that courts in the UK are not yet ready to recognize new tort of privacy are *Wainwright v. Home office*³³² and *Campbell v. MGN*

³²⁷ Art (8) ECHR provides that everyone - not only celebrities- has the right to protect his private, family life. However, this has to be balanced with art (10) ECHR which provides for freedom of expression.

³²⁸ [2000] QB 967.

³²⁹ [2000] QB 967 at para 10. For further discussion of the case see Raymond Wacks, 'Why there will never be an English common law privacy tort' in Andrew T. Kenyon and Megan Richardson (eds), *New Directions in privacy law: international and comparative perspectives* (Cambridge University Press, New York 2006) (hereafter referred to as Wacks, 2006).

³³⁰ Boyd, 2002, Ent. L.R. 6-7.

³³¹ See Lord Phillip for the court at para 53 *Douglas v Hello! Ltd* [2005] EWCA Civ 595; Vaver, 2009, p 9; Bruggemeier, 2010, pp 27-28.

³³² See Lord Hoffmann for the court at paras 31-35 *Wainwright v. Home office* [2003] 4 All ER 969 where the arguments against recognition of a general tort of invasion of privacy were evident.

*Ltd*³³³ where award of damage was also based on breach of confidence, although the requirement of confidential relationship was not fulfilled. Thus, it appears as if breach of confidence as G. Howells puts it is the 'de facto tort of privacy'³³⁴ in English courts.

These slow moves and piecemeal fashion of protection, could suggest that the UK is eventually moving towards a UK personality right. This is because different aspects of personality rights are already protected under different laws. However, for the meantime 'In spite of the wideness and vagueness of the French notion of "rights of the personality", it seems justifiable, therefore, to consider this breach of the law as corresponding to the Anglo – American law of privacy'³³⁵.

³³³ [2004] E.M.L.R. 15 at paras 43, 133.

³³⁴ Cited in Bruggemeier, 2010, p 28.

³³⁵ Stromholm, 1967, p 54.

2. Personality rights crossing borders:

Today, personality rights are likely to be the subject of cross-border disputes. One can come up with several scenarios in which personality rights are the center of a transnational dispute. For example, if one finds his name published in a website of a racist nature, such publication will most likely be harmful to his reputation. The mere appearance of his name in such a website could be interpreted as an agreement from his side to the ideology or message behind the website. If someone finds his private family photos uploaded on YouTube as part of a video (slide show) composed by someone he does not know. The video infringes this person's right of privacy as it can be viewed by anyone with internet access.

In these and similar scenarios, personality rights are infringed. Such infringement is not confined to one jurisdiction as personality rights can be subject to a wide range of online transactions. As a result, courts find themselves frequently encountering cases where personality rights intersect with conflict-of-laws, and the question of applicable law is accordingly triggered.

a. Applicable choice-of-law rules to personality rights:

In order to answer the question which law applies to personality rights in cross-border disputes, the judge will need to apply the related choice-of-law rules.

According to the provisions of Rome II Regulation, personality rights are excluded from the scope of the Regulation³³⁶. Therefore, each Member State will apply its own national choice-of-law rules to cross-border disputes involving personality rights.

Personality rights were excluded from the scope of the Regulation because Member States failed to agree on the appropriate conflict rule to be applied to personality rights. As a result, personality rights had to be excluded:

...there was a failure to arrive at a consensus over the appropriate conflict rule to deal with what in the proposal was termed obligations arising out of violations of privacy and rights relating to the personality. This part of this proposal was therefore withdrawn by the Commission at a late stage with the commitment in the review clause to requisition a comprehensive study in this area of conflicts.³³⁷

The law of personality rights is mostly in case law. For that reason, it is not surprising that harmonization of national laws of Member States turned out to be difficult³³⁸. However, the role which the ECHR plays in providing a solution to

³³⁶ Art 1(2)(g) Rome II Regulation.

³³⁷ Martin George, 'Heiderhoff: privacy and personality rights in the Rome II Regime: Yes –Lex fori please!' [2010] <<http://conflictoflaws.net/2010/heiderhoff-privacy-and-personality-rights-in-the-rome-ii-regime-yes-lex-fori-please/>> last accessed 10 Sep 2012, p 1 (hereafter referred to as George, 2010) all the documents prepared in the co-decision procedure are available from the Legislative Observatory on the website of the European Parliament <<http://www.europarl.europa.eu/oel/popups/ficheprocedure.do?id=23514>>.

³³⁸ Engle, 2005, p4.

the problem of harmonization to the contents of the rights of personality³³⁹ should not be overlooked.

Those who expect the European Legislator to draft a new conflict rule for personality rights see that this rule must fit the doctrinal structure of the Regulation. Furthermore, a new conflict rule must fit the requirement under recital 7 of the Regulation which requires a consistent interpretation of Rome II and Brussels I, this is particularly important in the light of the ECJ's judgment in *Shevill* case³⁴⁰. In November 2011, these expectations have been finally translated into actions. The Committee on Legal Affairs of the European Parliament has issued a new Draft Report to the commission on the amendment of Regulation (EC) No864/ 2007 on the law applicable to non-contractual obligations (Rome II)³⁴¹. The purpose of the amendment is to include personality rights in the scope of the Regulation.

Nevertheless, until the recent proposal to include personality rights in the Rome II Regulation is adopted, each EU Member State is left with no option but to apply its national choice-of-law rules to cross-border personality rights. These conflict-of-laws rules are expected to differ from one jurisdiction to another. However, what is undisputed is the fact that infringement of general personality rights is classified as non-contractual liability (tort) in both legal traditions.

³³⁹ Engle, 2005, p12.

³⁴⁰ [1996] 3 All E.R. 929; this case established the 'mosaic' principle, Gilles Cuniberti, 'Von Hein on Rome II and defamation' [2010] <<http://conflictoflaws.net/2010/von-hein-on-rome-ii-and-defamation/>> last accessed 15 Sep 2012, p 1 (hereafter referred to as Cuniberti, 2010).

³⁴¹ Will be discussed in details in Part 4 - Specifically designed choice-of-law rules for moral rights: A new proposal.

b. General personality rights and the related connecting factors:

To ensure continuity and efficiency of legal relationships in the international dimension, parties should be allowed to go into cross-border legal relationships without fearing the application of unexpected law to their disputes. For some scholars, a connecting factor relating to the law most closely connected to the legal relationship would achieve this end³⁴². This approach is supported by those in support of the allocation method³⁴³, according to which, a legislator needs to gather similar legal situations or positions under one category or one legal idea. Once these similar legal positions are identified, a connecting factor is designated and a conflict rule is attached to each category of legal issues³⁴⁴.

A point of attachment or a connecting factor is drawn from the elements of the legal relationship. A legal relationship consists of subject, parties and cause. A point of attachment is drafted based on the most important element in the legal relationship which is evaluated '... with respect to the particular issue.'³⁴⁵ Accordingly, this will differ from one legal relationship to another. For example, parties are the most important element in personal status cases, thus, conflict rules in most legal systems point towards one's personal law to be applied i.e. the law of one's nationality or domicile. In matters related to *rights in rem*, the most important element is the subject of the legal relationship, hence, the location of

³⁴² Al'aal, 2007, p 22.

³⁴³ The allocation method is the applicable choice-of-law method in most countries, it will be further discussed in Part 4 – Chapter I.

³⁴⁴ Awad Alla Shaibat Alhamad Alsayed, *Private international Law in the Kingdom of Bahrain: a comparative study (conflict of laws, international judicial competence and enforcement of foreign judgments* (Bahrain University Press, Sukhair 2007) 25 (hereafter referred to as Alsayed, 2007); also Okasha Mohamed A. Al'aal, *Conflict of laws: a comparative study* (Dar Aljame'ah Aljadeeda, Alexandria 2007) 23 (hereafter referred to as Al'aal, 2007) 18 (hereafter referred to as Al'aal, 2007).

³⁴⁵ Brilmayer and Anglin, 2010, p 1163.

the real property is the adopted criterion. As for contractual obligations, the 'cause' of the legal relationship is the most significant element. Hence, the selected point of attachment is the parties' will in relation to contracts, and where the wrongful act or harm occurred in non-contractual obligations³⁴⁶.

Yet, some commentators question the traditional approach which is established on the assumption that there is only one exceptionally strong contact with the dispute that justifies application of the law of that particular jurisdiction³⁴⁷. In their opinion, this approach is not preferable as it leads to what is known as 'a single factor theory'. These scholars argue that this approach could have been suitable for earlier historical periods, but not for a time where the development of technology and communication revolution made identification of one single factor an unrealistic task³⁴⁸. Therefore, these scholars call for a consideration that will take into account the context of the case rather than a single factor (trigger), hence, giving more importance to 'weighing or balancing'³⁴⁹.

In any case, the general understanding for the role and function of connecting factors is to provide a link between the legal issue and the potentially applicable law. The link is drawn based on the assumption that the law which the connecting factor points at, is the one most strongly connected to the dispute. In relation to personality rights, the role played by points of attachment or connecting factors remains unchanged. The goal is to link personality rights with a potentially applicable law that has the closest connection with these rights. And since these rights -as their name suggests- are personal (clearly illustrated in

³⁴⁶ Al'aal, 2007, p 21-22; Alsayed, 2007, pp 26-27.

³⁴⁷ Brilmayer and Anglin, 2010, p 1127.

³⁴⁸ Brilmayer and Anglin, 2010, pp 1147-1148.

³⁴⁹ Brilmayer and Anglin, 2010, pp 1151-1152, 1128-1129.

relation to one's legal status and capacity³⁵⁰), connecting factors would naturally point to laws that are connected to one's personality. As a general rule, this is commonly interpreted as one's nationality (a civil law concept)³⁵¹, or domicile (a common law concept), or habitual residence (a concept developed by the Hague Conference on PIL as a compromise between the concept of nationality and domicile.³⁵²)

³⁵⁰ Status is "... the condition of belonging to a particular class of persons to whom the law assigns certain peculiar legal capacities or incapacities or both." Whereas capacity is to decide whether a particular person is capable or incapable of going into a specific legal transaction; J.G. Castel, *Conflict of laws: cases, notes and materials* (4th edn Butterworths, Toronto 1978) 8-3 (hereafter referred to as Castel, 1978).

³⁵¹ For example, art 21(1) of the Civil and Commercial Procedures Act of Bahrain 1971 (CCPA 1971) clearly states that one's legal capacity and civil status is to be determined according to the law of his nationality.

³⁵² To read more on nationality, domicile and habitual residence see Clarkson and Hill, 2006, pp 20-51.

B. Examining the similarity between moral rights and general personality rights

One needs to acknowledge the fact that considering moral rights part of personality rights can hardly be accepted in the Anglo- American tradition. This is because a different story took place under this tradition where the rational underlying the existence of copyright in general is socio-economic as clearly expressed in the Statute of Anne.³⁵³ The effect of such socio-economic approach is that it was difficult for this school to recognize moral rights in the same manner adopted by continental tradition. Moral rights were seen as forming restriction on contractual freedom which is an essential principle in the Anglo-American tradition. Hence, it was difficult to see how moral rights could be classified as personality rights in the common law jurisdictions.

This result is not surprising because looking back at the history we can see that when France was developing its civil code in the 19th century, it was undergoing political revolution seeking to improve the rights of man. During the same time the UK was undergoing an industrial revolution. In addition to that, when moral rights were developing in Europe, art was highly valued in some European countries as a cultural identity, where the situation in the UK and the US for example was different since the focus was more on the industrial culture rather than the artistic one, hence “The resulting intellectual property rights reflected that emphasis of industry and commercialism over a more European humanist viewpoint”³⁵⁴.

³⁵³ The socio-economic role is also stated in the U.S. constitution where the Congress may “promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” Kamiel J. Koelman, ‘Copyright law and economics in the EU Copyright Directive: is the droit d’auteur passé?’ [2004] IIC 603 (hereafter referred to as Koelman). The same applies to the justification provided for in the Statute of Anne which is “an Act for the encouragement of learning”, Teilmann, 2005, p 73. On the same point see Nocella, 2008, Ent. L.R. 153.

³⁵⁴ Robert C. Bird, ‘Moral right: Diagnosis and rehabilitation’ (2007) available at <<http://ssrn.com/abstract=1033021>> last accessed 2 Oct 2012, p 7 (hereafter referred to as Bird, 2007)

In order to determine the actual scope of similarity between moral rights and general personality rights it is important to understand what is actually protected under moral rights.

This examination starts from the very meaning of moral rights to the interests listed under its title. The term moral rights is a translation of the French term *droit moral*³⁵⁵, it is important not to overlook this factor because of the differences between the French and English terms. Many commentators think that the term 'moral' is not an accurate translation for the French term '*moral*'. Professor Kwall suggests translating the German term for moral rights instead of the French term since the German term means "rights of the author's personality". Although this term might not capture all aspects of protected rights under moral rights, it is better than associating the term 'moral' with 'legal'³⁵⁶. In her opinion, the term 'personal rights' reflects the true theoretical basis behind this concept.³⁵⁷ Supporting this view is Professor Edward J. Damich who also believes that 'personal rights' is a closer translation to the French term *droit moral*³⁵⁸.

It is believed that this inaccuracy in translation - as some commentators argue - has caused suspicion for English speakers. This is because: '... "moral" is commonly contrasted with "legal", one's first reaction to a "moral right" is that it

³⁵⁵ Andre Morillot a French jurist was the first to use the term *droit moral* in a technical sense (1878): according to him, author's right is of a dual nature; Damich, 1988, Ga. L. Rev. p 29.

³⁵⁶ Cited in Bird, 2007, p 13

³⁵⁷ Roberta Rosenthal Kwall, 'preserving personality and reputational interests of constructed persons through moral rights: a blueprint for the twenty first century' [2001] University of Illinois Law Review 151-171 presented at the Symposium: Intellectual property challenges in the next century, p 3 para 158 (hereafter referred to as Kwall, 'preserving personality', 2001).

³⁵⁸ Damich, 1988, Ga. L. Rev. p 6.

is something to which one has no legal entitlement—only a moral or (if one prefers polysyllables) deontological entitlement³⁵⁹.

American judges found moral rights to be alien to the American culture, the use of the term ‘moral’ played a significant role in forming such view because ‘moral’ obligations are not seen as legal requirements³⁶⁰. It was difficult to see how the two terms could be merged together, as H.L.A. Hart’s stated: ‘law and morality are best kept separate’³⁶¹

On the other hand, some commentators like Mr. Bird, argue that moral rights should not have been named as such because these rights protect

...an artist, her work, and the creative process in a fashion not radically different from most intellectual property rights. They also guard the non-morally embedded public interest in preserving artistic intention and cultural heritage...³⁶²

Whether the currently used term is an accurate or inaccurate translation of the French term, it is the commonly used and accepted term today. The important factor is that these rights have nothing to do with morality, they simply deal with non-economical interests of authors. Hence, moral rights can be defined as ‘...

³⁵⁹ David Vaver, ‘Moral rights yesterday, today and tomorrow’ IJL&IT (Presented to a meeting of the British Literary and Artistic Copyright Association (BLACA) at the offices of Theodore Goddard, London on July 8, 1999) 2 (hereafter referred to as Vaver, 1999); Lauriane Nocella gives a similar supporting argument: ‘... moral right comes from the French expression *droit moral*, but its translation suggests that there is an element of morality which makes this right suspect and difficult for English speakers. Since the word “moral” is commonly contrasted with “legal”, one’s first reaction to a “moral right” is that it is something to which one has no legal entitlement’ Lauriane Nocella, ‘copyright and moral rights versus author’s right and *droit moral*: convergence or divergence?’ [2008] Ent. L.R. 152 (hereafter referred to as Nocella, 2008).

³⁶⁰ Bird, 2007, p 12.

³⁶¹ Bird, 2007, p 12.

³⁶² Bird, 2007, p 13.

the legal expression of the link uniting the authors and their work, giving them some control over it...'³⁶³ or as put by Professor Al-Shaikh: 'it is one of the personal rights that intends to guarantee protection for the personality of the author only through his creation not the absolute personality of the author in its general sense'³⁶⁴. Bear in mind, that there is a significant element in these definitions which one should not overlook. This is the fact that moral rights only come into being when a copyrighted work is created³⁶⁵. This is why moral rights are considered to be an element of copyright³⁶⁶. Accordingly, what is protected under moral rights is the author's personal interest only in relation to his copyrighted work.

³⁶³ Nocella, 2008, Ent. L.R. 152.

³⁶⁴ Ramzi Rashad Al-shaikh, *Neighboring rights to the author's right* (Dar Algame'a Aljadeeda, Alexandria 2005) 440 (hereafter referred to as Al-shaikh, 2005).

³⁶⁵ In addition, this work must not be excluded from moral rights protection. According to CDPA 1988 a computer program, the design of a type face and any computer – generated work are excluded from moral rights protection; CDPA 1988 Sec 79 and 81.

³⁶⁶ Rigamonti, 2006, Harv. Int'l L.J. at p 360.

1. Moral rights protecting the author's name: the attribution right

The attribution right is also known as 'the right of paternity', can be defined as 'the right of an author to be associated and identified with his own work'³⁶⁷. The French sees this right as the author's right to respect for his name and authorship.³⁶⁸

The right to attribute the work to its actual creator was recognized in the antiquity as well as Middle Ages³⁶⁹. The right protects the author's right in having his work rightly attributed to him, this includes correctly spelling the author's name and attaching whatever titles related to it (Dr. Prof. ...etc)³⁷⁰. The attribution right as an author's moral right does not exist on its own. Existence of this right -like all other moral rights- is subject to the existence of the copyrighted work.

In France, when the question concerns one's right in his name and biography (which is considered a personality right), disparate laws might be applied in

³⁶⁷ Davis and Garnett, 2010, p 5.

³⁶⁸ Ciolino, 1994, Tul. L. Rev. 940.

³⁶⁹ Adeney, 2006, pp 10-11. In Islamic law, the role played by the Prophet's companions was responsible for development of the attribution right as they had to scrutinize the accuracy of attributing certain sayings to the Prophet. The science of scrutinizing the narrated sayings of the Prophet became an independent science referred to as 'Esnad' which in Arabic means 'predication: affirmation of something about another'. Several highly important scholars in Islam were specialized in this field. They authored compilations which helped Muslims tell the difference whether a certain saying of the prophet was accurately or falsely attributed to him. The system of attribution continued its development and it evolved to include principles of forbidding literary piracy. They also had depositing system which was known as "Takhleed" which in Arabic means perpetuation referring to perpetuation of intellectual works; Alnajar, 2000, pp 25-27.

³⁷⁰ Adeney, 2006, p 180.

addition to laws relating to the protection of privacy. One of these numerous laws is the French IP Code (art L 121.1) regarding author's moral rights, in particular the attribution right³⁷¹. The attribution right and the right to protect one's name and bibliography (as a general personality right) would not have been listed under the same umbrella if the attribution right was not seen to appropriately fit under general personality rights.

However, the situation in common law jurisdictions is not the same. There is nothing titled as 'personality rights' to say that one can list the attribution right under the same umbrella. As explained earlier, in common law traditions, personality rights are protected through different methods. Hence, protecting one's name is probably best achieved through passing off³⁷².

It is worth noting that, the legal means used to protect what is traditionally considered as 'general personality rights' are the same as those that were once used to protect author's moral rights. These common law tools include defamation, liable, breach of confidence and passing off. If moral rights and general personality rights (in their conventional senses), are not purposely similar, they would not have been protected under the same common law tools.

Hence, it is difficult to try and draw a decisive line between the interests protected by the attribution right and those protected by the right in one's name as a general personality right. The essence of both rights is the same. There is one goal both rights aim at protecting which is one's right in having his actual name attributed to him. The person entitled to use the right however differs from one situation to another. Accordingly, an author is able to protect his right under general personality rights as a natural person, as well as under moral rights as an

³⁷¹ Charles de Haas, 'France: International privacy, publicity and personality laws' in Michael Henry (ed), *International privacy, publicity and personality laws* (Butterworths, London 2001) 144 (hereafter referred to as Haas, 2001).

³⁷² Jonathan Griffiths, 'Misattribution and misrepresentation – the claim for reverse passing off as “paternity” right' [2006] IPQ 34-54 (hereafter referred to as Griffiths, 2006).

author. Obviously, he can only exercise his attribution right if his name was the subject of an attack in relation to his work.

Thus, the attribution right is concerned with the author's name, a personality related interest. At the same time, such personality related interest is attached to the author's work, hence, suggesting that the attribution right is a general personality right, however, with private nature.

2. Moral rights protecting the author's honour, integrity and reputation: the integrity right

The integrity right is:

...the right to respect for the integrity of a work; this enables the author to object to any distortion; mutilation or other unauthorized modification of the work, and to any other derogatory action in relation to the work, so as to preserve the work in the form in which it was created ³⁷³.

In a simple phrase, the right of integrity gives the author 'the right to respect for ... his work'³⁷⁴. This right is considered to be the heart of author's moral right³⁷⁵ and is arguably the most important component of *droit moral*³⁷⁶.

The goal is to keep the work in its 'original' form just as created by the author, and to protect what the author intended to create by preserving his original intention in his work³⁷⁷. As described by Treiger-Bar-Am: '...The integrity right

³⁷³ Davis and Garnett, 2010, p 6.

³⁷⁴ Ciolino, 1994, Tul. L. Rev. 941.

³⁷⁵ Zemer, 2012, p. 140.

³⁷⁶ Best illustrated in the French case *Buffet c. Fersing*, (Cour d'appel, Paris, 1962 Dalloz, Jurisprudence 570) also see Ciolino, 1994, Tul. L. Rev. 941.

³⁷⁷ Adler, 2009, p 7 para 277.

safeguards not the meaning of a work, which is in the eye of the beholder. Rather, the right protects the author's message, which is determined by the sender³⁷⁸. In this sense, the integrity right has an important role to the public as it maintains the authenticity and originality of the artistic message and provides a common reference point³⁷⁹.

The integrity right –as an author's moral right- is based on the notion of personal connection between the author and his work. This very principle justifies why there is no integrity right in inventions, as Hansmann and Santilli argue: '[a] plausible justification for this distinction between inventors and artists is that the marketability of an invention has little relationship to the personal identity of the inventor and, in particular, to the other items that the inventor has patented.'³⁸⁰

The scope of protection for the integrity right greatly differs between common and civil law traditions, the latter grants it wider and stronger protection than the

³⁷⁸ Leslie Kim Treiger – Bar – Am, 'Christo's Gates and the meaning of art: lessons for the law' (2005) E.I.P.R. 390 (hereafter referred to as Treiger, 2005).

³⁷⁹ Zemer, 2012, p. 137. The public function of moral rights in general and the integrity right in particular is an interesting topic, some commentators argue that the power given to the author under the integrity right might not always be in the benefit of the public. There are several situations where artists for example exercised this right in conflict with the public interest. Authors do not necessarily know whether their works are good or bad and whether it deserves to be preserved or not. This is in addition to how common law countries see their film and record industry handicapped by moral rights. These and other arguments are used by those not in favor of moral rights, several articles have been published on the case against moral rights especially by American commentators. To read how moral rights do not fit into the modern artistic world in general and into the American legal system in particular see Jon A Baumgarten, 'On the case against moral rights' in Peter Anderson & David Saunders (eds), *Moral rights Protection in a Copyright System* (Institute for Cultural Policy Studies, Griffith University 1992) (hereafter referred to as Baumgarten, 1992) , also Amy M. Adler, 'Against moral rights' (2009) New York University school of law – Public law and legal theory research paper series – working paper No. 09-14 <<http://ssrn.com/abstract=1365437>> last accessed 2 Oct 2012 (hereafter referred to as Adler, 2009), also Julien, 2002, pp 6-14.

³⁸⁰ Michael Rushton, 'An economic approach to copyright in works of artistic craftsmanship' [2001] IPQ 258 (hereafter referred to as Rushton, 2001).

earlier³⁸¹. Moreover, in civil law jurisdictions this right continues to exist even after the expiry of the protection for the economic rights, the justification is to protect the author's personality reflected in his work as long as the work is capable of being disseminated³⁸². As explained earlier, civil law traditions require certain level of 'originality' so that the work enjoys copyright protection. Originality requires that the personality of the author be present in his work³⁸³. In common law traditions, one's personality does not need to be reflected in his work to qualify as 'original'³⁸⁴, nevertheless, the same interests (honor and reputation) are still protected even if to a lesser degree.

³⁸¹ It goes without saying that the integrity right – like all other rights- is not absolute. Limitation to exercising any right is essential to avoid misusing or abusing the right, Zemer, 2012, p 137. This applies to exercise of moral rights as well as of personality rights. In theory under French law, authors do not need to provide a detailed justification to exercise moral rights (these rights are considered discretionary), however, in reality the situation is different, Adeney, 2005, IPQ 130; Dietz, 1994, IIC 182-183. For example, scope and limits of moral rights were addressed in *A. Conus Rachmaninoff v. Gaumont* June 2002, (2003) 196 R.I.D.A 284. Moreover, if it is clear that the author's motivation in his moral rights claim is related to a personal interest other than his artistic integrity, courts will dismiss his claim and consider it as a misuse of his moral rights, Maxwell, 2004, Ent. L. R. 125.

³⁸² Sylvie Nerisson, 'perpetual moral rights: a troubling justification for a fair result' [2005] IIC 953-954 (hereafter referred to as Nerisson, 2005).

³⁸³ Dietz, 1994, IIC 181.

³⁸⁴ It is worth noting that there is a recent update regarding the originality test at the EU level, as the reader may already know that question of originality has been discussed by the ECJ in *Infopaq* (*Infopaq International A/S v Danske Dagblades Forening* (C-5/08)). The court stated in para 35 that copyright subsists in photographs only '... if they are original in the sense that they are their author's own intellectual creation.' Nevertheless, in *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890 the English Court of Appeal did not find the originality standard set by *Infopaq* to be binding as para 20 of the decision reads: 'Although the Court refers to an 'intellectual creation' it does so in the context of paragraph 35 which clearly relates such creation to the question of origin not novelty or merit. Accordingly, I do not understand the decision of the European Court of Justice in *Infopaq* to have qualified the long standing test established by the authorities referred to in paragraph 19 above' However, this understanding for *Infopaq* by English courts as not setting a substantive creative requirement for copyright to apply can no longer be sustained in the light of the ECJ recent judgment in *Painer v*

The message which is embodied in the creator's work reflects the author's personality, thus, un-permitted acts done in relation to the author's work impair the ability of his work to accurately reflect his message i.e. his personality.³⁸⁵

The integrity right aims at protecting the reputation, honor and message of the actual creator of the work, thus, only attacks on these interests will result in infringement of the integrity right³⁸⁶:

a. Integrity

According to Oxford Dictionary there are 2 possible definitions for integrity: 1. Honesty; moral strength 2. Wholeness; soundness.

In the light of this definition, the author's integrity right was probably named as such because its purpose is to maintain *the honesty* and *wholeness* of the message the work conveys to the public.

b. Reputation

'Reputation' is defined in its first sense in the Oxford Dictionary as 'what is generally said or believed about character of person or thing'. Injury to reputation

Standard Verlags GmbH (C-145/10) where the ECJ explained in paragraphs 87-90 that intellectual creation is an author's own if it *reflects the author's personality*. Therefore, it seems that the ECJ wanted to send a message to the courts in the UK saying that paragraph 35 of *Infopaq* intended to set out a substantive creative requirement for copyright to apply.

³⁸⁵ Kwall, 'Authors-stories', 2001, p 7 (fn 103).

³⁸⁶ Therefore, if there was a particular perspective in the mind of the observer or receiver associated with the original work, any modification for the support will not matter as long as the observer's perspective is not affected, Agustin Waisman, 'rethinking the moral right to integrity' [2008] IPQ 272 (hereafter referred to as Waisman, 2008).

could take the form of economic loss and loss of self-esteem, hence, reputation is interest in substance and personality³⁸⁷.

Therefore, the integrity right protects the author's reputation by preserving his image and how he is generally perceived in relation to his work in the eyes of the public.

c. Honour

'Honour' has different meanings in English language. It has 12 meanings in the Oxford Dictionary some of which include: high respect, public regard and reputation. However, considering the use of the term in the treaty, honour is most likely a combination of two concepts. The first concept is close to the concept of reputation which is the respect one holds by others. The second concept is the sense of self worth or dignity that is undermined or challenged by contemptuous treatment (how the author values himself based on how others perceive him)³⁸⁸. Dr. Adeney believes that both meanings are consistent with the use of the terms in the Convention³⁸⁹.

So, does the term 'honour'³⁹⁰ add anything more to the concept of 'reputation'? In the UK it is regarded as adding nothing³⁹¹. However, what the delegates suggested in the process of drafting art 6*bis* BC in relation to 'honour' indicates that 'honour' has more into it than the author's reputation³⁹². Bear in mind, that

³⁸⁷ Damich, 1988, Ga. L. Rev. p 76.

³⁸⁸ Elizabeth Adeney, 'The moral right of integrity: the past and future of "honour" ' [2005] IPQ 121 (hereafter referred to as Adeney, 2005).

³⁸⁹ Adeney, 2005, IPQ 121.

³⁹⁰ On the history of using the term 'honor' see Adeney, 2005, IPQ 113-115.

³⁹¹ Adeney, 2005, IPQ 112.

³⁹² Adeney, 2005, IPQ 118.

the words 'honour and reputation' were included as a needed compromise in order to draft art 6bis BC. The two notions reflected personal interests that were protected by common law actions (defamation and passing off) and hence could be understood and accepted by the UK³⁹³.

Interpretation of the meaning of the author's integrity right and its components suggests that this right seem to be understood in a general personality rights sense. The integrity right aims at protecting the author's integrity, reputation and honour in relation to his work.

Again, it seems difficult to differentiate between what is intended to be protected under author's integrity right as a moral right and what is intended to be protected under integrity right as a general personality right. The obvious difference is that one is attached to the mere existence of a natural person and the other is attached to a natural person but *only* in relation to his copyrighted work. Again the examined factors suggest that this right is a general personality right with private nature.

3. Moral rights protecting the author's privacy: the divulgation right

Privacy '... is an aspect of the broader right of personality which, in turn, derives from the notion of individuality embedded in the institutions of western civilization.'³⁹⁴ Defined in the Oxford Dictionary as: '1. (right to) being private 2. freedom from intrusion or publicity ' Or simply explained as '... the right to be let alone by strangers with no public interest to pursue'³⁹⁵

On the other hand, the divulgation right -also known as the right to disclosure- is defined as: 'the right to decide when, by whom, whether, in what form and on

³⁹³ Durie, 1991, Ent. L.R. 40.

³⁹⁴ Damich, 1988, Ga. L. Rev. p 82.

³⁹⁵ Sims, 2005, IPQ 30.

what terms, a work will be made available to the public for the first time³⁹⁶. This right empowers the author with the authority to decide when and how to publish his work. Dr. Khater Lutfi considers this right to be the most important right for the author because there is nothing more important to the author than to decide when his work is intellectually complete and ready to face the external world. As he argues, this is an absolute right that can only be exercised by the author of the work. The author's exercise of this particular right marks the start point for the existence of all his other moral rights³⁹⁷. Therefore, the author under this right can defend his right to refuse presenting the work to the public to keep it for his private or personal access away from the public attention. From an economical point of view³⁹⁸, the divulgation right is certainly the first step an author takes to financially benefit from his work.

The divulgation right is not a recognized moral right in common law tradition. However, it is seen in civil law tradition as a principal moral right that cannot be relinquished. If one goes back in time, according to Roman law, the right of ownership in a property is fortified when the owner abandon the property. Yet, the divulgation right was established by French courts against this principle. An early French case clarified the idea. The plaintiff was an artist who was not satisfied by a number of paintings, he torn them and threw them in the rubbish. However, a rag picker found the pieces and sold them to an art collector. Eleven

³⁹⁶ Davis and Garnett, 2010, p 6.

³⁹⁷ Khater Lutfi, *The comprehensive encyclopedia concerning author's right laws and artistic works: a doctrinal practical study* (publisher not mentioned, 1994) 56 (hereafter referred to as Lutfi K).

³⁹⁸ In general, there is no doubt that moral rights involve pecuniary interests. Michael Rushton argues that although moral rights are always viewed as non-pecuniary rights yet, these rights are: '...a property right with exchange value...' Rushton, 2001, IPQ 257. However, some commentators go as far as to deny the personal link authors have with their creations because, as they argue, moral rights cannot be dissociated from money, see Michael F. Flint, 'Moral rights in the theatre and some comments on moral rights and audiovisual works' Association Littéraire et Artistique Internationale, *Le droit moral de l'auteur: The moral right of the author*, Congress of Antwerp 19-24 September 1993 (ALAI, Paris, 1994) 472 (hereafter referred to as Flint, 1993).

years later, in 1925 the plaintiff found out that the paintings he torn and threw were actually restored and sold to the defendant Francis Carco who owned an art collection. The plaintiff's main objection was that the work was disclosed without his consent despite the fact that he had abandoned the physical ownership in the paintings when he threw them in the rubbish. The court found that the special connection between the author and his work justifies superseding the Roman law principle concerning ownership, the court thus concluded that allowing the disclosure of an author's work without his consent means allowing violation of the author's personality³⁹⁹. As the Supreme Court stated that an author's work is 'the expression of his thoughts, his personality, his talent, his art, and in philosophical terms, of his individual self'⁴⁰⁰.

In relation to the CDPA 1988, the right to disclosure is not recognized as such under the Act. The owner of the economic right is not necessarily the author of the work, yet, can prevent publication of copies of a work under the CDPA1988⁴⁰¹. Preventing publication of the contents of unpublished works can be practiced under the law of confidential information, according to which publication of such unpublished works will constitute breach of confidence⁴⁰².

Interestingly however, one finds the right of privacy conferred under CDPA 1988 as part of chapter IV (moral rights). Section 85 of the Act provides that if a person commissions someone to take photos or film for private purposes, then he has the right not to have this work communicated to the public by any means without his permission.

³⁹⁹ *Camoin et Syndicat de la propriete artistique c. Francis Carco, Aubry, Belattre et Zborowski*, (1927) Trib. Civ. De la Seine (judgement confirmed by the Cour D'Appel de Paris, 6 March 1931) cited in Stina Teilmann, 'Justifications for copyright: The evolution of *le droit moral*' in Fiona Macmillan (ed), *New Directions in copyright law* (Edward Elgar, Glos 2005) 78-79 (hereafter referred to as Teilmann, 2005).

⁴⁰⁰ Teilmann, 2005, pp 78-79.

⁴⁰¹ See Chapter II of the Act.

⁴⁰² Davis and Garnett, 2010, p 81.

The author of a photograph is the person who takes the photo, in case of a commissioned work, the commissioner is the copyright owner and therefore the only person entitled to invoke section 85. If the photo is taken without the permission of its subject, then the person who is the subject of the photo cannot rely on section 85 of CDPA1988, rather will have to try achieving protection under passing off, defamation, breach of confidence or Data Protection Act 1998 and will most likely have a better chance to succeed under the latter. If the copyright owner in the photograph decided to publish it while the subject of the photo rejects the publication, the priority is for privacy unless it contradicts with a public interest. Thus, the moral right of the author of the photograph does not prevail over the right of privacy of individuals unless there is a public interest in publishing the photograph. It is also worth pointing out that this right is not categorized as a moral right in other legal systems or in the BC⁴⁰³.

Generally one can say that authors in common law tradition are able to protect the essence of the divulgation right (although it is not recognized as a moral right) under the CDPA1988 in relation to published works and under common law (breach of confidence) in relation to unpublished works. Therefore, it appears that the core and essence of the divulgation right is derived from the right of privacy, and privacy is an interest that is part of the right of personality⁴⁰⁴. The divulgation right can be protected by the same means used to protect the right of privacy both under civil law tradition where personality rights are recognized, and under common law tradition where the essence of personality rights is protected although not yet recognized as such.

C. Moral rights intersecting with general personality rights in case law

Generally speaking, the line between author's moral rights and general personality rights appears to be vague. Both sets of rights aim to protect interests

⁴⁰³ McQueen, Waelde and Laurie, 2008, p 98.

⁴⁰⁴ Rigamonti, 2006, Harv. Int'l L.J. at p 397.

of similar nature, nevertheless, there are two obvious differences that differentiate general personality rights from moral rights. The first is with regard to the scope of both rights, general personality rights have wider scope of protection and contain rights that are not part of moral rights. The second difference is in relation to the person entitled to exercise the right, general personality rights can be exercised by any natural person, however, moral rights are limited to authors (and performers) *in relation* to their protected works.

These important differences are why moral rights cannot be considered identical to general personality rights, but rather can only be seen as special form of general personality rights. The following examples should help clarify how the line between the two rights can be hard to identify:

Example 1:

Publication of Adam's novel online without his permission, is an infringement of Adam's divulgation right as an author. Whereas an article published in English speaking newspaper (circulating in most of Europe and Asia) revealing information of intimate or private nature about Adam, is an infringement of Adam's personality right (privacy right).

In both scenarios, an infringement occurs because an act is done without authorization revealing information which the person entitled to do so (Adam) does not want it (yet or ever) to be revealed to the public. In both scenarios, the act was done against the entitled person's judgment regarding when and how to share his work with others. The goal under both rights is similar, and both rights -in terms of their objectives- could be interchangeable.

Example 2:

(James) is a famous author who agreed to have his novel adapted in a movie, however, the novel was modified and altered in a significant way shifting the focus of the story to a different angle. The movie was played in movie theaters of 4 European countries, constituting an infringement to James's integrity right. In a different situation, Paul (who has over 5000 followers on Twitter) shared an

edited private photo on Twitter where (James) was made to look as if he was participating in a racist behavior. Such act is therefore an infringement to James's personality right (reputation right).

Once again, in both scenarios, the act is classified as an infringement because it results in harming James's reputation. Modification to James's work without his permission is an attack on the integrity of his work which could eventually harm his reputation as an author. On the other hand, attack on James's personality on Twitter will likely harm his personal reputation.

The goal in both situations is similar, protecting reputation in its general and particular sense.

Thus, moral rights appear to have similar function to general personality rights. Existing case law from common law courts will illustrate how the heart of what is traditionally recognized as personality rights is protected in common law. At the same time, other cases will show how the interests of moral rights were also protected in common law, in fact these cases have been used to support the long-standing assertion by common law that it had provided authors with protection equivalent to that given under moral rights.

1. Reputation as a general personality right and an element of the author's integrity right: *Archbold, Esq v Sweet* (1832)⁴⁰⁵

In this case, the defendant published a third edition of the author's (plaintiff) book, which contained many errors and mistakes. The jury found that these errors and mistakes with the author's name attached to the book injured his reputation. Accordingly, the court ruled in his favour⁴⁰⁶.

⁴⁰⁵ [1832] 172 ER 947.

⁴⁰⁶ *Durie*, 1991, Ent. L.R.41.

Protection of one's reputation certainly shows that common law does recognise personality rights. Moreover, the facts of this particular case can almost be identical to the definition of the integrity right.

2. Using 'passing off' to protect against 'false attribution': *Samuelson v Producers Distributing* (1932)⁴⁰⁷:

The Plaintiff was the owner of the copyright in a dramatic sketch titled 'The New Car', the sketch had great success and made her Majesty the Queen laugh⁴⁰⁸. The defendant put out a film called 'His First Car' wrongly claiming it to be a film version of the sketch. The court protected the plaintiff's interest through passing off.

In this case, protection was granted to guarantee accuracy of the source so that one cannot pass himself as another. Therefore, passing off is purposely similar to the attribution right, more precisely, to false attribution.

3. Protecting the author's integrity right via other means: *Frisby v BBC* (1967)⁴⁰⁹:

A contract was concluded between two parties, the plaintiff was commissioned by the BBC to write a television play called 'And Some Have Greatness Thrust Upon Them'. The contract contained a clause which prevented the BBC from making any structural alterations without the writer's consent, when the BBC deleted a sexually explicit line, the author claimed that it was important to his play. The court accordingly decided that the contract was a licence of the

⁴⁰⁷ [1932] 1 Ch.201.

⁴⁰⁸ *Durie*, 1991, Ent. L.R.41.

⁴⁰⁹ [1967] 2 WLR 1204.

copyright only not an assignment. The plaintiff succeeded because the BBC did not have right of adaptation.⁴¹⁰

Despite the fact that protection was not granted under moral rights, the reality is that it is difficult to overlook the strong link between facts of this case and the integrity right. Alteration to author's work is a classical example of moral rights infringement, and in particular the integrity right.

4. Achieving protection to the attribution right through liable and passing off: Dorothy Squires case (1972)⁴¹¹:

This case was brought by Mrs. Edna May Moore, professionally known as Dorothy Squires against The National Sunday Newspaper. The National Sunday newspaper (the defendant) published an article on the front page titled: "The Girl Who Lost The Saint. When Love Turns Sour By Dorothy Squires", and on an inner page a big headline: "How my love for the Saint went sour by Dorothy Squires", followed by "talking to Weston Taylor." in smaller letters. The article was about the plaintiff's private life with her ex-husband, the nature of the article -as the plaintiff argued- suggested that Dorothy Squires was the kind of person who did not mind to uncover the faults and sins in her life in return of money. Accordingly, Dorothy Squires main claim was damages for liable contained in the article, and as a subsidiary claim for damages for breach of sec 43 of the Copyright Act 1956 i.e. the defendant falsely attributed authorship of the article to the plaintiff.

The Court of Appeal dismissed the appeal and awarded the plaintiff damages for liable. In addition to that, the court found that the article falsely attributed authorship to Dorothy Squires. In constructing sec 43 of the Copyright Act 1956, Lord Denning stated that the:

... plaintiff was "a person" who could bring an action for damages for unlicensed attribution of authorship, for the right of action given by the

⁴¹⁰ Durie, 1991, Ent. L.R.42.

⁴¹¹ Moore v News of the world and another [1972] 1 All ER 915 (CA) also discussed in Durie, 1991, Ent. L.R. 47

section was not limited to professional authors; and where the claim for the statutory offence was linked with another cause of action, a separate award of damages might be given for the statutory offence if the other cause of action did not cover the injury caused by false attribution of authorship...⁴¹²

Lord Denning's decision in *Dorothy Squires* case clearly shows that the interest moral rights protect are the same as those protected under liable or passing off, the latter was used regularly in the context of false attribution and breaches for the integrity interest of the creator⁴¹³.

In *Dorothy Squires* case, Lord Denning awarded damages for false attribution of authorship. However, Lord Denning clarified that the injury caused by false attribution could be covered under another cause of action (as can be imagined this includes liable and passing off), to say otherwise means the claimant could obtain damages in liable or passing off as well as in moral rights for the same complaint, a situation which could not be allowed. Hence, if one obtained damages in liable he will not be entitled to damages in moral rights for the same complaint.⁴¹⁴ This shows that what is protected under moral rights (at least in the clear case of false attribution) is understood by English courts to be equally protected under passing off or liable.

Today, the CDPA1988 provides protection for author's moral rights, however this does not change the fact that an author is still entitled to resort to protection under liable and passing off. What needs to be highlighted here is that passing off and liable are used to protect interests that are protected under general personality rights, at the same time, the same legal tools can be used to protect the same interests protected under authors' moral rights. This illustrates that English courts recognize the existence of common factors between moral rights and general personality rights.

⁴¹² Moore v News of the world and another [1972] 1 All ER 915 (CA) 442-443.

⁴¹³ For more details see Griffiths, 2006, IPQ 34 – 54.

⁴¹⁴ Durie, 2001, p 451.

5. Association of the integrity right with art 10 ECHR: Confetti records & others v Warner Music UK Ltd (2003)⁴¹⁵:

In 1995, Mr. Andrew Alcee (the third claimant) composed a track of garage music named 'Burnin', he assigned his copyright in the track to Confetti Records in June 2002. The Defendant issued to the public a sound recording containing "Burnin" with additional rap line (string dem up one by one). Mr. Andrew Alcee as the actual creator of the track "Burnin" brought a claim for infringement for his integrity right as an author under sec 80 CDPA 1988.

The court found that there was no infringement for the author's integrity right because there was no evidence for any prejudice to the author's reputation or honour, nevertheless, it concluded the following important points:

1. The author's assignment for his copyright does not affect his authorship.⁴¹⁶
2. Derogatory treatment to the author's work has to prejudice his honour or reputation, or else there will be no infringement for the integrity right⁴¹⁷.
3. Sec 80 CDPA 1988 is designed to protect the *reputation of others* and therefore is a basis for *restricting art 10 of the ECHR* on the exercise of the right of free expression⁴¹⁸.

The court found that there was treatment to the work, however, this treatment did not prejudice the author's reputation or honour, hence concluded that there was no infringement for the author's integrity right.

Despite this conclusion, the court made a very important point, it admitted that the integrity right is intended to protect the reputation of others and thus could

⁴¹⁵ [2003] EWHC civ 1748. Discussion of the case will be limited to the facts that raised question of derogatory treatment to author's integrity right. Facts concerning whether a contract was concluded or not will not be addressed here.

⁴¹⁶ [2003] EWHC civ 1748 at 152.

⁴¹⁷ [2003] EWHC civ 1748 at 149-150, 152.

⁴¹⁸ [2003] EWHC civ 1748 at 161.

restrict art 10 ECHR. This conclusion reflects the court's general interpretation of the integrity right, as the right seems to be evaluated against the primary source from which its existence was derived at the first place, that is the right of reputation as a general personality right. As a result, the court found the integrity right to be restricting art 10 ECHR. Hence, clearly associating author's moral rights with what is commonly understood as general personality rights.

D. Interim conclusions:

This chapter examined moral rights and general personality rights in conflict-of-laws through addressing important issues and considerations. The chapter illustrated great deal of similarity concerning the essential function of general personality rights and moral rights including the fact that both rights are recognized but not created by law. The philosophy behind legislating moral rights at the first place suggests that moral rights ought to be attached to the personality of the author. Thus, protection of moral rights through personality rights –at least in civil law tradition- is undisputed⁴¹⁹. However, as moral rights cannot exist independently from the copyrighted work, they cannot be classified as general personality rights. Hence, moral rights are general personality rights with private nature.

The attribution right as an example, has a goal of protecting the author's name and guaranteeing identifying him as the creator of his work. The essence of the right of one's name is therefore similar, yet, limited in its scope to copyrighted works. The same applies to the integrity right which provides protection for the author's honour, integrity and reputation. Interests that are already defined and recognized under general personality rights, however, once again, limited to copyrighted works. The divulgation right is not different. It protects the author against unpermitted communication of his work to the public, hence, respecting

⁴¹⁹ Rigamonti, 2006, Harv. Int'l L.J. at p 393 for example in Switzerland, moral rights were not protected until 1992 when the copyright statute was enacted. However, Swiss courts protected moral rights before 1992 through 'general right of personality' Rigamonti, 2006, Harv. Int'l L.J. at p 392.

the author's privacy. Therefore, the right is clearly derived from the right of privacy as a general personality right.

Finally one can say that what have been examined in this chapter suggests that author's moral rights are closely connected to the personality of the author. The connection reflects the true nature of these rights as derived from general personality rights. An evident proof to the personal nature of moral rights is their inability to be transferred. Moreover, although protection and recognition to both rights is expected to be minimum in common law courts, yet, the similarity between the two rights was surprisingly approved by English courts.

Chapter III

International moral rights cases: analysing courts' application to choice-of-law rules

The previous examination to moral rights and general personality rights in conflict-of-laws suggests that moral rights and general personality rights are purposely similar.

At the current stage of this research, it is important to study the most important judicial decisions in transnational moral rights cases to date. The goal is to study and analyze the relevant cross-border moral rights cases to determine whether courts tend to take the matter beyond the scope of copyright or not. With regard to applicable law, the similarity between the two rights could have an effect on courts' treatment for these rights.

It is expected to see courts dealing with moral rights based on the historical development of copyright in each jurisdiction. For example, in the 19th century, development of personality rights on the international level was closely connected with the emergence of intellectual property rights. The French copyright doctrine recognized moral rights of authors and artists from as early as the 1900⁴²⁰ as a reflection for personality rights. Yet, in the UK, the historical development did not take the same pattern. Personality rights were not recognized and hence were not reflected in copyright. Interests were protected through common law i.e. defamation, passing off and breach of confidence, and at a later stage the term 'privacy' was explicitly used.

In any case, one needs to bear in mind that there is limited number of reported international moral rights cases, and that 'Moral rights cases are highly fact specific, making it difficult to extract hard-and-fast rules from the case law'⁴²¹. As a result, the analytical task is expected to be complex.

⁴²⁰ Bruggemeier, 2010, p 13.

⁴²¹ Maxwell, 2004, Ent. L. R. 121.

A. Examining cross-border moral rights cases:

1. *Shostakovich* case⁴²²:

a. Summary of facts⁴²³:

In 1948 Twentieth Century Fox in the US released *The Iron Curtain*. The credits at the end of the movie included a statement which read 'Music from selected works of the Soviet Com-posers, Dimtry Shostakovich, Serge Prokofieffe, Aram Katchatutian, Nicolai Miashovsky, conducted by Alfred Newman'. The film was in 87 minutes, however, a total of 45 minutes were of the Russian composers' music reproduced during the duration of the film.

The Russian composers brought an action before the court of New York, they claimed that the use of their music in this film could falsely indicate their approval or participation in the film. They argued that their association with the film could be interpreted as being disloyal to their country.

b. First instance and Court of Appeal:

The Court of New York ruled that the case was clearly related to the moral rights of the authors. Existence of these rights was not clear in the current state of law, thus, the court found that there was no grounds to grant the plaintiffs any relief. The judgment of the Court of New York was approved on the same grounds.

⁴²² *Shostakovich v. Twentieth Century-Fox Film Corp.*, 80 N.Y.S.2d 575.

⁴²³ This case has been discussed by several commentators, see for example: Bertrand, 2011, p 3; Durie, 1991, Ent. L.R. 42; Dworkin, 1995, p 42.

c. When the film was released in France:

The film was released in France in 1949 under its French name *Le Rideau de Fer*. This time the case was brought before French courts by the French company *Le Chant du Monde* which enjoyed the exclusive rights to their musical works in France. This is why this case is usually referred to in French textbooks as *Fox Europa and Twentieth Century Fox v. Le Chant du Monde*⁴²⁴.

The judgment of the 1st Chamber of the Court of Appeal of Paris is the one often quoted, it stated that foreign authors should enjoy copyright protection in France if there is no legislation that states otherwise. Accordingly, the Russian composers could not only benefit from moral rights protection in France, but any use of their music without their consent would amount to copyright infringement. This judgment took matters beyond what was expected, Russian authors were not to be deprived from copyright and moral rights protection in France even though the Soviet Union was not part of any copyright convention then. Russian authors would be treated in France as French authors and this is regardless of the condition of reciprocity.

d. The situation of foreign authors changed in France⁴²⁵:

In 1964 the French president Charles De Gaulle visited the Soviet Union on an official state visit, he was presented with a Russian translated version of his memoirs (without his permission). Few weeks later, Charles De Gaulle requested a law which would apply the principle of reciprocity to foreign works. Therefore, a law was voted in France on 8 July 1964, according to which foreign authors would enjoy copyright protection in France only if the country of the origin of the work grants French works protection there. However, art L.111-4 of the Code of IP provided that no impairment maybe made to the integrity or

⁴²⁴ Bertrand, 2011, p 4.

⁴²⁵ Bertrand, 2011, p 6.

paternity of the foreign work, this means that moral rights protection was maintained untouched even in relation to foreign works. The scope of the ruling rendered in *Shostakovich* case was reduced to moral rights only. It is worth noting that reciprocity is hardly an issue before French courts because adherence to BC and UCC fulfils this condition.

e. Interim Analysis:

In general, the outcomes of this case in both scenarios are not surprising. It is quite interesting to see how the wide scope of *Shostakovich* case was reduced to moral rights, and therefore, the integrity and paternity of the foreign work would still be protected regardless of the principle of reciprocity.

Reduction in the scope of protection along with such explicit exclusion makes one wonder about the reason behind it. Is it because moral rights are considered to be special form of personality rights that the notion of reciprocity does not apply to it? Is there any other justification or explanation to this exclusion? It appears that moral rights are considered to be of great importance to the French society, hence, their protection becomes priority even in the absence of reciprocity. This in itself is very similar to the situation of general personality rights, where these rights are mostly protected by national constitutions and hence lower level of protection is not accepted even if reciprocity is not applicable. For example, if a case containing a foreign element is brought before French courts concerning one's right to choose his religion, it is expected that French courts would not pay much attention to the scope of the right granted to the party claiming protection in the country of origin (country of his nationality). This is because, the French society and accordingly its legislator, understands one's right to choose his religion to be part of the order public.

On the other hand, American legal tradition at that time did not recognize moral rights – not even in a limited sense like the case with VARA⁴²⁶. Therefore, New

⁴²⁶ (VARA) 1990; There was no expressed recognition of moral rights in the US prior to VARA; however, those rights were protected in one form or another by the state legislations on copyright

York courts did not find any grounds to support the plaintiffs and grant a relief. However, would the plaintiffs have had a better chance in succeeding if their case was brought under alternative common law tools that are used to achieve the same result? Theoretically, the answer would most likely be 'yes'. Meaning, if the act in question qualified to be brought under passing off for example, courts in the US would have granted a judgment in support of the plaintiff if the requirements for passing off were met. This is regardless of the nature of what is protected i.e. author's right or non-author's rights. Accordingly, it is possible to see courts in the US protecting author's interests under common law tools if these interests fit under the latter category. Therefore, the essence of moral rights could have been protected even by courts in the US.

2. The Kid ⁴²⁷

a. Summary of facts:

In this 1959 case, Charles Chaplin (was the actor and author of the film) brought an action before French courts to prevent distribution in France of a version of his silent masterpiece *The Kid* that had been 'enhanced' through addition of a musical accompaniment. Charlie Chaplin was granted the same moral rights enjoyed by French authors. This is despite that Chaplin had no claim to moral rights in the country of origin (the US). Reciprocity was again not taken into consideration for granting such rights to foreign authors.

law, defamation, unfair competition, passing off and breach of contract; later when the US joined Berne an Ad Hoc working group in the US concluded that moral rights needed to be protected; Jane C. Ginsburg, 'Moral rights in a common law system' [1990] Ent. L. R 123 (hereafter referred to as Ginsburg, 1990); therefore '... Congress adopted the VARA to signal to the international community that it recognizes the personal dimension of the creative process' Zemer, 2012, p 129.

⁴²⁷ *Richebe v. Charlie Chaplin* (1960) 28 RIDA 133, discussed in Bertrand, 2011, p 5.

b. Interim Analysis:

Once again, the outcome of the case is expected as French courts certainly see a personal link between the author and his intellectual creation. Therefore, it comes as no surprise that French courts ignored the level of protection granted in the country of origin and protected the author's moral rights in cross-border dispute.

3. The Aristocats⁴²⁸

a. Summary of facts:

The plaintiff had agreed to write a story about aristocrat family of cats living in Paris, the story would then be made into a film. The plaintiff agreed to grant Disney the right to make revisions, changes and adaptations to the screenplay. Nevertheless, when Disney decided to make a film based on the plaintiff's story using cartoon cats, it did not attribute the story to the plaintiff⁴²⁹.

The plaintiff brought an action before French courts for moral rights infringement. The court of first instance found that Disney was responsible for infringing the plaintiff's attribution right, however, the Cour d'Appel ruled:

... considerations of French public policy could only be applied with the greatest caution to contracts the subject of foreign laws. The legal certainty of contracts would be destroyed if a party who had contracted according to the law of one state were to seek to avail himself of the contracting law of another state. It was well established that the law of the country in which contracts are signed becomes the law of the parties. Thus, neither the Universal Copyright Convention, nor any other provisions of international law, would permit the plaintiff to

⁴²⁸ *Rowe v Walt Disney* [1987] F.S.R. 36.

⁴²⁹ Case is also discussed in Maree Sainsbury, *Moral rights and their application in Australia* (Federation Press, Sydney 2003) 177 (hereafter referred to as Sainsbury, 2003).

invoke the moral rights afforded by the French Act which were denied to him by the law of the contract ...⁴³⁰.

b. Interim Analysis:

The outcome of this case was surprising as it was 2 years prior to the famous *John Huston* case. French courts which are expected to provide the maximum level of protection to moral rights, refused to do so on the basis of respecting the law of country of origin. If the country of origin does not recognize moral rights, then it should not be granted to the plaintiff by French courts.

Refusal to grant the American author protection under French moral rights, was derived by its desire to guarantee legal certainty. The surprising element in this case was the fact that the French ruling in this case was contrary to the previous French rulings regarding the same issue. However, as this case is not the latest authority in the field, it loses its importance in the light of the coming judgment.

⁴³⁰ [1987] F.S.R. 36 at 5, also cited in Bertrand, 2011, p 9.

4. John Huston⁴³¹

a. Summary of facts

John Huston was an American film director who directed the film *Asphalt Jungle*. Huston directed his film in black and white and renounced his rights in the US to The Turner Entertainment Co (TEC). The latter merged with Metro Goldwyn Meyer (MGM) and accordingly, acquired the rights to *Asphalt Jungle*. As the owner of the rights in the film, (TEC) colorized the motion picture and broadcasted it in its colorized version⁴³², colorization of the film in the US was in accordance to US law. However, the heirs of John Huston objected to the colorization and filed an action against *La Cinq* (French TV channel), the goal was to prevent broadcasting the colorized version of *Asphalt Jungle* in France. They argued that it was an infringement of the moral rights of the author (director) of the work⁴³³.

⁴³¹ Turner Entertainment Company v Huston (1991) 149 RIDA 197. This particular case has been heavily addressed by most commentators dealing with the issue of applicable law to moral rights, examples include: Philippe Matignon, 'Case comment: France film- author's moral rights in his work' [1995] Ent. L.R. 124-125 (hereafter referred to as Matignon, 1995); Maxwell, 2004, Ent. L.R. 124; Hellstadius and Meier-Ewert, 2005, IIC 333-334; Waelde and De Souza, 2002, IPQ 278-279, Bertrand, 2011, pp 6-11; Mary LaFrance, *Global issues in Copyright Law* (Thomson Reuters, USA 2009) 98-108 (hereafter referred to as LaFrance, 2009). On the particular issue of moral rights in relation to colorization of films see Claudia Roggero, 'colourisation and the right to preserve the integrity of a film: a comparative study between civil and common law' [2011] Ent. L.R. 25-30 (hereafter referred to as Roggero, 2011).

⁴³² Colorization of black and white films was a technology used by NASA in 1986, Bertrand, 2011, p 6.

⁴³³ Colorization was refused by authors although it appeared to be favored by the public, for example, Woody Allen described colorization of films as it 'insults artists and society', Bertrand, 2011, p 7.

b. Court's decision⁴³⁴

The Court of First Instance of Paris held that the author's moral rights prevailed over the exploitation right. Despite that under US law, exploitation belonged to the producer, *La Cinq* was still prevented from showing the colorized film.

The Court of Appeal of Paris in 6 July 1989 overturned the first judgment and held that Huston's heirs had no moral rights in the film and that the rights in the film were vested in (TEC). The court of Appeal limited the author's (the director) right to a mere announcement at the beginning of the movie advising the audience that the movie is originally recorded in black and white. The court's view was that it was not possible to invoke moral rights against the legally obtained adaptation rights by Turner Entertainment.

In 28 May 1991, the court de cassation overturned the court of Appeal's decision and crushed all previous principles including that concluded in *The Aristocats* case. The court stated:

According to the first of these texts, the integrity of a literary or art work cannot be affected in France, regardless of the State in whose territory the said work was made public for the first time. The person who is its author, by its creation alone, enjoys the moral right stipulated in his favor by the second of the aforesaid texts; these are laws of mandatory application.⁴³⁵

⁴³⁴ *Turner Entertainment Co v Huston*, CA Versailles, civ. ch., December 19, 1994, translated in (March 1995) Ent. L. Rep. available at <<http://www.unclaw.com/chin/teaching/iip/turner.pdf>> last accessed 3 Oct 2012, p 2. See Philippe Matignon, 'Case comment: France film- author's moral rights in his work' [1995] Ent. L.R. 124-125 (hereafter referred to as Matignon, 1995); also Bertrand, 2011, pp 7-8.

⁴³⁵ LaFrance, 2009, p 102.

The Court de Cassation referred the case to the Court of Appeal for rehearing. The Court of Appeal of Versailles gave judgment on the issues of the case on 19 December 1994 in adherence with the principles put by the Court de Cassation. The court held that under French law, moral rights are non-assignable, therefore, the heirs of the estate of John Huston are entitled to exercise his moral rights. It does not matter whether the author was French or a foreign national.

c. Interim Analysis

The ruling in *John Huston* case made the French position towards moral rights in cross-border disputes quite clear. The case is considered to be a landmark for several reasons. Although the author in the case was not French national⁴³⁶, the French *Cour de Cassation* nevertheless found it important to protect author's moral rights in France. It appears that moral rights were all that mattered to the French *Cour de Cassation*. The importance of these rights is high enough for French courts to consider these rights to be of mandatory application.

What was approved in the *Aristocats* case was similar to what was adopted by French court of Appeal in *Huston* case, yet was later smashed by the Court de Cassation. Thus, the outstanding principle to date is the one adopted in the *Huston* case.

⁴³⁶ The court of first instance of Paris, relied when it gave its judgment on the UCC signed in Geneva 1952. The convention was ratified by the US, and the main point was that citizens of member states were to enjoy the benefit of the 11 March 1957 Law in France, including section 6 which provided for the protection for moral rights, LaFrance, 2009, p 101.

B. Moral rights as an element of copyright in cross-border disputes: increase lenience towards personality rights?

The previously examined international moral rights cases were mostly brought before French courts, except for *Shostakovich* case which was before New York courts. Based on these cases, French courts seem to be taking the matter beyond the scope of copyright. Yet, one needs to keep in mind that French courts are not expected to invoke French level of moral rights protection if exploitation is taking place in another country. This is because works exploited in other jurisdictions would not have an effect on French territory as long as the work is not exploited in France, and accordingly, France will not be affected if this particular work is subject to weaker moral rights protection. Hence, the applicable law would be that of the jurisdiction wherever the work is exploited⁴³⁷.

However, it is important to mention that there are no French cases to support this 'assumption'. In *Beineix v StudioCanal Image*⁴³⁸, a case was brought against a French director who sued in a French court to complain about distribution of a DVD version (that allegedly contained a modified soundtrack) of *Diva* in the United States. Here the court dismissed the case on other grounds without solving the applicable law question⁴³⁹. The situation remained unaddressed in French case law even in subsequent cases, in *Martinelli v Gallimard*⁴⁴⁰ the case involved an Italian author and a contract governed by English law. The French Court applied English law to the issues involving the author's "economic" rights and French law to issues involving the author's "moral" rights. This was possible because the work was exploited in France.

⁴³⁷ Maxwell, 2004, Ent. L. R. 125.

⁴³⁸ Nanterre Tribunal de Grande Instance, Référé, December 4, [2002].

⁴³⁹ Maxwell, 2004, Ent. L. R. 125.

⁴⁴⁰ (2003) 198 R.I.D.A. 413.

Author's moral rights in France are clearly considered part of personality rights, this background justifies why application of moral rights is raised to 'mandatory level'. French courts could not accept a lower level of protection. A similar position would be taken if the matter concerned any clearly categorized personality right, the French courts' approach is that we might not be able to control the situation in other jurisdictions, however, we cannot allow it to take place in ours.

It is hard to see how this approach could have been applied if moral rights were purely seen as part of copyright. It is only because the nature of moral rights in France is considered part of personality rights that 'mandatory application' was attached to it. As Ginsburg & Sirinelli described the wording used by the court de cassation to be:

puzzling because it was unusual, if not new under French international private law, but it means that any description of an 'author' other than the one given by French law and any contractual provision implying a failure to recognize moral rights were inapplicable in France, whatever the system under which the work originated or the contract was signed⁴⁴¹

However, for one to be able to draw a conclusion as to whether courts take the matter beyond the scope of copyright when it comes to cross-border moral rights disputes, the examination should not be confined to how French courts deal with the subject. Nevertheless, the absence of decisions given by common law courts in cross-border moral rights cases leave one with limited options. Hence, the only way left to deal with the matter is by studying the 'expected' behaviour of courts in common law tradition if put in a similar position. 'Expectation' will be based on the similarity already established between the essence of what is protected under general personality rights and moral rights in both legal systems.

The paternity and integrity rights, as the two internationally recognized moral rights, enjoy the minimum level of protection provided for under the BC. This is true even in relation to common law jurisdictions, including the US yet limited to works of visual arts. It is also a given fact that case law proved that the essence of moral rights can be protected using the same common law tools used

⁴⁴¹ Cited by Bertrand, 2011, p 10.

for protecting general personality rights. The use of the term 'general personality rights' is not used in common law traditions, yet, it does not change the fact that the interests protected are related to one's personality, and so, one should not overestimate the importance of terminology.

If one was to imagine that application of English choice-of-law rules will lead to application of law of country (X) which does not recognize one's right in fair trial for example, would English courts still apply this law? The answer is certainly in the negative, since to do so would be a breach of the ECHR and English public policy. One might argue that the situation in relation to moral rights might not go as far as this, still, it would be interesting to see how English courts will react towards application of any law that does not recognize moral rights at all. Would English courts in such case apply this law? Or would it state that lower level of protection than that provided under CDPA 1988 is not accepted? One can only speculate as there is no available case law to date.

So, did courts take the matter beyond the scope of copyright? This writer believes that it is quite hard to answer this question as the current state of related case law only reflects civil law tradition. The lack of one's ability to examine common law approach to this question means that a generalised answer will likely provide inaccurate evaluation of the issue. Yet, one should remember that common law tradition approves and recognizes the similarity between moral rights and general personality rights on the substantive level.

Therefore, one could be uncertain that there is increase lenience towards personality rights in common law courts. Nevertheless, the recognized similarity between moral rights and general personality rights in common law system, supports one's expectation that common law courts would refuse application of any law that does not recognize moral rights at all of example.

Chapter V

Evaluation and summation

This part explored the possibility of detaching moral rights from copyright in conflict-of-laws. The outcomes of this part can be summed up in several important points.

There are serious problems associated with application of *lex loci protectionis* to moral rights infringements. At the same time, personality rights in conflict-of-laws proved to be problematic on the EU level. However, there is a new proposal to include personality rights in the Rome II Regulation, thus, the present situation is expected to change soon.

Moreover, moral rights seem to protect interests that are essentially similar to general personality rights. As a result, courts from the civil law tradition – in particular France- seem to be taking author's moral rights beyond the scope of copyright by refusing application of any lower level of protection within their jurisdiction. Still, it is difficult to reach a general conclusion, because one can hardly find cross-border moral rights cases that are brought before common law courts at the first place.

In addition to that, there are important considerations that one should not forget, most important of which is the difference between moral rights and copyright. This distinct nature encouraged some commentators to argue that the only way to give moral rights real status is by making them independent from copyright:

Perhaps the conclusion is that for moral rights to be given any real status, they must exist independently of copyright. Undoubtedly in certain respects they are comparable, but in order to give life to Article 6bis of Berne, it appears to be necessary to create an autonomous set of rights with a conceptual basis of their own⁴⁴²

⁴⁴² Durie, 1991, Ent. L.R. 44.

However, the main problem one faces in relation to calls for making moral rights independent from copyright, is that existence of moral rights depends on the creation of the copyrighted work, and therefore, it is hard to see how moral rights can be separated or independent from copyright. Nevertheless, once moral rights come into existence, their unique and different nature from copyright stands in the way of treating them equally.

Therefore, in order to provide an accurate evaluation for this part, one should take into account the above mentioned results and considerations. As a result, one can state that the lack of judicial decisions from common law tradition is a significant factor, yet, the door for speculations and suggestions remains open.

The crucial factor that should *not* be underestimated when it comes to evaluating the position of moral rights in conflict-of-laws is the *similar function of what is traditionally recognized as general personality rights and at least the universally recognized moral rights i.e. paternity and integrity rights*. The similarity between both rights on the substantive level is expected to have an effect on the applicable choice-of-law rules accordingly. In fact, such interrelation should be consistent with theories and goals of choice-of-law. Thus, not only the problems associated with *lex loci protectionis* call for searching for an alternative choice-of law-rule, but most crucial of all is not to list two different rights in nature (copyright and moral rights) under one category for choice-of-law purposes. If the current choice-of-law rules are designed for copyright, it is hard to see how these rules can be suitable for moral rights cases. In choice-of-law terms, applying copyright choice-of-law rules to moral rights will not lead to the application of the most appropriate law.

For these reasons, this Part concludes that there needs to be a call for detaching moral rights from copyright in conflict-of-laws. The process of allocating the appropriate applicable law to moral rights should take into consideration the strong link moral rights have with general personality rights, a link that is no less important than the link moral rights share with copyright.

Part 4

Specifically Designed Choice-of-Law Rules for Moral Rights:

A New Proposal

The investigation undertaken in Part 3 clearly showed that moral rights and copyright are different in nature. Each right aims at protecting different interests and thus its goal is different. Furthermore, moral rights in transnational cases -in particular those brought before courts of civil law tradition- have been listed as an exception to the country of origin rule and to the *lex protectionis* principle⁴⁴³.

These considerations and arguments need to be kept in mind when addressing choice-of-law question. Choice-of-law rules are not created in a vacuum, these rules are designed with substantial law in mind. Moreover, a choice-of-law rule points to law of country (x) rather than law of country (y) because the former law is seen as the law most closely connected to the dispute, and hence the most suitable to govern the legal relationship. Several theories were presented to justify such selection, most important of which is the allocation method, the method searches for the 'seat' of the legal relationship and applies the law presumed to be most closely connected to that seat.

As moral rights and copyright do not share the same important elements in a legal relationship, it is difficult to see how a common 'seat' can be presumed. As a matter of fact, such presumption is expected to lead to inaccurate results, and therefore, opening doors for suggestions to detach moral rights from copyright in conflict-of-laws.

However, a suggestion to detach moral rights from copyright in conflict-of-laws needs to be completed with a proposal that identifies the applicable law to moral rights, this time as independent set of rights in conflict-of-laws.

So, is there a need for specifically designed choice-of-law rules? Is the link between moral rights and general personality rights strong enough to call for attaching moral rights to general personality rights in conflict-of-laws? Part 4 – the final part of this thesis- proposes a new solution. This writer's new proposal is principally driven by her recognition to the importance of the connection

⁴⁴³ Some argue that if moral rights are seen to be linked to the author's personality then these rights should be part of the personal law of the author. Moreover, some suggest listing moral rights as fundamental human rights; Boschiero, no 6.

moral rights share with *both* copyright and general personality rights in conflict-of-laws.

Therefore, the first chapter of this Part is of an essential need, it examines the preliminary factors that play crucial role in the formulation of the new proposal. Hence, chapter I is divided into 3 sections: A. choice-of-law theories, objectives and the relationship with substantive law, B. Identifying common elements between moral rights, copyright and general personality rights in conflict-of-laws, C. Recent important developments of personality rights in conflict-of-laws at the EU level. The second chapter presents this writer's new proposal. The new proposal addresses moral rights in cross-border torts and contracts. Finally, the principal connecting factor adopted by the new proposal is evaluated against other connecting factors.

Chapter I

Preliminary factors

Choice-of-law rules can be described as '... a *technique* which enables the courts to reach a solution by applying the domestic law of a particular legal unit to the facts of the case.'⁴⁴⁴ Hence, conflict rules do not provide substantive protection to the disputed issue because PIL 'is a technique and not a system of substantive rule'⁴⁴⁵. This particular nature made influence from abroad to these rules not easily welcomed⁴⁴⁶. The guidance these rules provide to the judge regarding the law to be applied in a dispute with a foreign element, is steered by the aim to achieve just and effective solutions in cross-border situations where there is more than one applicable law to the dispute⁴⁴⁷.

This understanding for choice-of-law rules means that there are certain preliminary factors that need to be taken into account for one to propose a new choice-of-law rule. The first is theories and objectives of choice-of-law rules and their relationship with substantive law. The second is the significant elements connecting moral rights with both copyright and general personality rights in conflict-of-laws. And the third is the recent important developments at the EU level regarding personality rights and Rome II Regulation.

⁴⁴⁴ Castel, 1978, 1-1.

⁴⁴⁵ Kurt Lipstein, *Principles of the conflict of laws, national and international* (Martinus Nijhoff Publishers bv, The Hague 1981) 2 (hereafter referred to as Lipstein, 1981).

⁴⁴⁶ Lipstein, 1981, p 2.

⁴⁴⁷ Eechoud, 2003, p16.

A. Choice-of-law rules: theories, objectives and the relationship with substantive law:

1. Theories on choice-of-law rules

Existence and development of PIL⁴⁴⁸ has always been based on co-operation between members of the international community⁴⁴⁹. In international relations, a minimum order is needed, and this can only be done by application of PIL rules. These rules are intended to offer some degree of justice, certainty and convenience to the parties involved in a cross-border transaction. In addition to that, if a court was to only apply its national law and internal rules, the result will likely be:

.... distortion of the intended obligations under contracts entered into in reliance on foreign law; the imposition of tort liability for conduct which the defendant was required by the law of the place where he acted to perform; the invalidation of marriages celebrated abroad on account of non-compliance with formalities specified by the *lex fori*, but impossible to comply with outside its territory; the abduction of

⁴⁴⁸ In England 'conflict of laws' and 'private international law' are used indifferently referring to the same thing. The two terms however, are not used to refer to the same thing in other jurisdictions, for example in France PIL refers to rules of French nationality as well as the legal position of foreigners in France, while conflict of laws in France refers only to the choice-of-law; Stone, p. 1 fn 1. As for the Bahraini legal system, it follows the French legal system concerning the used terminology. Hence, PIL is of wider scope than conflict-of-laws. What is worth pointing out however, is the fact that there is no separate code for PIL in the Bahraini legal system, provisions of PIL are stipulated in the Civil and Commercial Procedures Act of Bahrain 1971 (CCPA 1971). Articles 21 and 22 of the CCPA 1971 deal with issues of applicable law; article 21 consists of 6 paragraphs and deals merely with applicable law to personal status, more precisely in relation to legal capacity of persons, marriage, guardianship and inheritance. Article 22 simply states that the applicable law must not contradict with the order public in Bahrain. Bearing in mind the very basic rules concerning applicable law, it is not surprising to say that there are no special provisions in relation to IP rights.

⁴⁴⁹ Kalensky, 1971, p 34.

children across borders with impunity; and automatic changes in the ownership of goods when they crossed a border.⁴⁵⁰

Principles of international coexistence particularly on the commercial sphere played great role as the motivating force in PIL⁴⁵¹. At the same time, political and ideological conditions had an impact on the initial concepts and formation of PIL. As Kalensky argues, these political conditions made PIL a ‘political matter’, and naturally, they had and still have an effect on its development process⁴⁵². Moreover, principles of mandatory co-operation of states in economic, social and cultural matters as required in the UN Charter⁴⁵³ are very important factors for the development of PIL.

R. Neuner words best illustrate the importance of PIL:

As long as men live under different laws private international law has a vital function. It has to coordinate many often conflicting interests. As in any other field of the law real progress can be achieved only by constant reflection on the policies to be pursued and the means to be applied.⁴⁵⁴

Therefore, societies need PIL rules to coordinate the conflicting interests in cross-border situations, at the same time, the development of PIL rules is

⁴⁵⁰ Stone, 1995, p 4.

⁴⁵¹ Based on this principle, English judges created English PIL where the dominant principle is the desire to do justice in cases with a foreign element, at the same time we should not forget that the motivating force of law in general is the need to establish order so that social life can exist and continue, Graveson, 1974, p 7.

⁴⁵² Kalensky, 1971, p 43.

⁴⁵³ Kalensky, 1971, p 18.

⁴⁵⁴ A quotation from R. Neuner, ‘policy considerations in the conflict of laws’ (1942) XX(6) The Canadian Bar Review, 501 cited in Svantesson, 2007, p 55. However, Currie on the contrary, went as far as to say that ‘We should be better off without choice of law rules’ cited in J.G. Collier, *Conflict of laws* (3rd edn, Cambridge University Press, Cambridge 2001) 384 (hereafter referred to as Collier, 2001).

essential for the growth of relationships and contacts between non-sovereign subjects surrounded by different legal systems and living in different states⁴⁵⁵.

The significant importance of conflict-of-laws draws attention to its theories which can be traced far back in history⁴⁵⁶. Generally, these theories were influenced by many countries, Italy from the 12 to the 14th centuries, France from the 14 to the 16th centuries, the Netherlands in the 17th century, the USA in the first half of the 19th century and second half of the 20th, while France, Italy, Germany and England had great influence in the second half of the 19th century⁴⁵⁷.

Applicable law theories and methods can be listed as the following: 1. The theory of comity 2. The theory of vested rights 3. The local law theory 4. Statutist theory 5. The allocation method 6. Policy evaluation methods (where courts look for the legislative policy behind a specific rule of law to determine the 'better law') 7. The theory of justice⁴⁵⁸.

Examination of these theories and methods should help understand how conflict rules are drafted. Nevertheless, the reader should bear in mind that this thesis is not of a historical nature, moreover, it addresses choice-of-law rules only in relation to author's moral rights. Therefore, examination shall only be limited to

⁴⁵⁵ Kalensky, 1971, p 34.

⁴⁵⁶ For the origin and development of the conflict of laws see Graveson, 1974, pp 30-32. In Juenger's book *Choice of law and multistate justice*, he deals in the first chapter with the historical overview, based on which one concludes two important principles: 1. PIL problems can be traced back to the 12th and 13th centuries i.e. not a new phenomenon 2. Every possible solution has been tried before. Hence, one is surprised by the similarities of the solutions provided today and those tried hundreds of years ago, see Joachim Zekoll, 'A review of choice of law and multistate justice' in Patrick J. Borchers and Joachim Zekoll (eds), *International conflict of laws for the third millennium: essays in Honor of Friedrich K. Juenger* (Transnational publishers, New York 2001) 9 (hereafter referred to as Zekoll, 2001).

⁴⁵⁷ Lipstein, 1981, p 2.

⁴⁵⁸ Graveson 1974, pp 36-40; Collier, 2001, pp 378 – 385.

the related modern theories on conflict-of-laws⁴⁵⁹, followed by a brief comment on the other theories.

The two related modern theories are Statutist theory and the allocation method.

a. Statutist theory⁴⁶⁰

This theory seeks to determine disputes by allocating any issue to its category by either categorizing it as real or personal⁴⁶¹. If categorized as real it will be governed by the law of the territorial situation of the act or thing, if categorized as personal it will be governed by the personal law of the party⁴⁶². This theory consists of methods and solutions that were developed between the 5th -17th century in Italy, France and the Netherlands⁴⁶³. The Italian commerce back then and the transfer of goods and persons, forced Italian scholars to look into questions of when did an Italian legal rule have an application abroad and when did it have an application on foreigners within its territory. Hence, the question is over which cross-border legal situations does the legal rule have an application? Important rules such as, the law of the forum (*lex fori*) governs

⁴⁵⁹ As Professor Lipstein rightly argues, there is no point in trying to find out whether rules of PIL existed in ancient Greece and Rome or not because in any case these rules did not influence the modern rules of this law. Importance could be attached to the period after the division of the Roman Empire where the problem of choice-of-law became evident because the Empire was divided by Germanic tribes; Lipstein, 1981, p 3.

⁴⁶⁰ Graveson, 1974, pp 36-37 also see Lipstein, 1981, pp 7-12.

⁴⁶¹ For more details see Roger C. Cramton, David P. Currie and Herma Hill Kay, *Conflict of laws: cases, comments, questions* (3rd edn, West Publishing Co, Minnesota 1981) 1 (hereafter referred to as Cramton, Currie and Kay, 1981).

⁴⁶² Graveson, 1974, pp 36-37.

⁴⁶³ Eechoud, 2003, p 25.

rules of procedure⁴⁶⁴ and that the applicable law to objects is the law where the object is situated i.e. *lex rei sitae* were developed by Italian scholars⁴⁶⁵. The French⁴⁶⁶ and the Dutch subsequent theories were based on the Italians' achievements. The French developed the well known French doctrine which classifies rules of private law into three categories: real statutes, personal statutes and mixed statutes.⁴⁶⁷ Dutch scholars based their theory on the principle of sovereignty as the general rule⁴⁶⁸, they were more concerned with the question which the French and Italians did not ask before which is why would a local court apply a foreign law at the first place? ⁴⁶⁹. This question led to the establishment of the Doctrine of comity. According to Huber -who is credited with the presentation of the new doctrine of comity- the doctrine states that there is nothing in the nature of foreign PIL that force national courts to apply it, however, the reason why national courts do so is based on the duty established by customary international law⁴⁷⁰

⁴⁶⁴ This is still the adopted principle in almost all national legislations as well as in international and regional instruments, for example this is what Max Planck Proposal has explicitly provided for in art 3:101 (*lex fori* is to be applied to procedural matters).

⁴⁶⁵ Eechoud, 2003, pp 25-26.

⁴⁶⁶ A historical background along with the achievement of this school is discussed in Lipstein, 1981, pp 8-9.

⁴⁶⁷ Eechoud, 2003, p 26.

⁴⁶⁸ Eechoud, 2003, p 27.

⁴⁶⁹ Generally discussed in Lipstein, 1981, pp 13-16.

⁴⁷⁰ Lipstein, 1981, p 15.

b. The Allocation Method

The Statutist theory began to lose its importance and by the late 19th century the dominance was for Savigny's ideas⁴⁷¹. Savigny broke territorialism by declaring that every legal relationship should be judged according to the legal system with which it has the closest connection⁴⁷². The goal is to have the same substantive solution applied to the case in question regardless where the case is brought⁴⁷³. Hence, each legal relationship must have a 'seat' which is defined as: 'a legal territory to which in its proper nature, it belongs or is subject'⁴⁷⁴, this seat is simply the 'center of gravity' of the legal relationship.

Therefore, legal relationships are divided into categories, such as issues relating to property of immovable, or succession or contractual obligations, then, a connecting factor is designated to every category according to its 'seat'. For example, the seat of a marriage relationship is the husband's domicile as he is considered the head of the family, the seat of immovable property is the location of the property, and so on.

Savigny's rules are abstract because the 'centre of gravity' of cases is decided objectively in advance. It is irrelevant that the case is *actually* connected to the law indicated by the connecting factors. The rules are neutral because they can

⁴⁷¹ Savigny's theory was also titled 'The International Theory', Graveson, 1974, pp 37-38; he was also known to be one of 'the universalists' jurists, see Collier, 2001, p 387.

⁴⁷² See Salah Aldeen Jamal Aldeen, *Conflict of laws: a comparative study between Islamic Sharia and legislation* (2nd edn, Dar -elfiker Algami, Alexandria 2007) 21-23 (hereafter referred to as S.Aldeen, 2007); Eechoud, 2003, pp 28-29.

⁴⁷³ Stig Stromholm, *Copyright and the conflict of laws: a comparative survey* (Carl Haymanns Verlag, Munich 2010) 65 (hereafter referred to as Stromholm, 2010).

⁴⁷⁴ Collier, 2001, p 387.

result in the application of any law regardless of its continent, so what matters is the jurisdiction not the content of laws⁴⁷⁵.

c. Other theories:

The 2nd half of the 19th century and the early half of the 20th century, codification of PIL in Europe -except in common law countries- was influenced by sociological approach of Mancini⁴⁷⁶. It centered on a particular nucleus such as territory, race, language, custom, history, laws and religion, the connection between an individual and nuclei was based on nationality⁴⁷⁷. Other theories developed in the 20th century in the USA such as the vested rights theory and the governmental interest analysis⁴⁷⁸, however both were criticized for inflexibility of their rules⁴⁷⁹.

Today, the dominant choice-of-law method in most countries remains the allocation method⁴⁸⁰. In the EU, the Rome II Regulation follows the European

⁴⁷⁵ Echoud, 2003, p 29.

⁴⁷⁶ Lipstein, 1981, p 28.

⁴⁷⁷ Lipstein, 1981, p 28, Mancini argued that nationality should be the starting point of PIL, Collier, 2001, 387.

⁴⁷⁸ Currie's governmental interest analysis means: the focus on the forum's interest and policy behind its laws; therefore the court applies the local rule to maintain the interest of the forum; Zekoll, 2001, p 15; also Arthur Taylor Von Mehren, 'Choice – of - law theories and the comparative – law problem' 23 (1975) Am. J. Comp. L. 755-756 (hereafter referred to as Mehren, 1975), Brilmayer and Anglin, 2010, pp 1152-1156.

⁴⁷⁹ Echoud, 2003, pp. 24-25

⁴⁸⁰ Echoud, 2003, p 16. In the Bahraini legal system, provisions of choice-of-law are only found in art 21 and 22 of the Civil and Commercial Procedures Act of Bahrain 1971 (CCPA 1971) art 21 deals with applicable law to personal status, more precisely in relation to legal capacity of persons, marriage, guardianship and inheritance, whereas, art 22 simply states that the applicable law must not contradict with the order public in Bahrain. Thus, art 21 is clear example of the

tradition and relies on Savigny's methodology⁴⁸¹ with some influence from American theories on conflict-of-laws.

system's adoption for the allocation method; where legal relationships are divided into categories and a connecting factor is designated to every category. As for the applicable law to contractual and non-contractual obligations, courts apply the internationally recognized rules, for example the Bahraini court of cassation adopted the well known principle of *lex loci delicti* in relation to torts despite absence of legal regulation in Bahraini CCPA 1971, for more details see Alsayed, 2007, p 260.

⁴⁸¹ Xandra E. Kramer, 'The Rome II Regulation on the law applicable to non-contractual obligations: The European private international law tradition continued' [2008] available online at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1314749> last accessed 2 Oct 2012, p 12 (hereafter referred to as Kramer, 2008).

2. Choice-of-law rules: objectives and the relationship with substantive law⁴⁸²

Clearly, one can say that identifying the applicable law in a cross-border dispute is the *raison d'être* for choice-of-law rules. Choice-of-law rules are there to guide national courts, in cases involving foreign elements, to the law which is presumed to be most closely connected to the dispute. This law is not necessarily the law of the forum, hence, choice-of-law rules could lead to the application of a foreign law. There are two main reasons behind applying a foreign law. The first is to serve the interests of the parties in the case, and the second is to protect or advance the interest of a foreign country⁴⁸³. National courts prefer standards of justice of country (x) rather than its own, because surrounding circumstances in a dispute support the presumption that law of country (x) rather than law of country (y) is more closely connected to the dispute. Therefore, one can say that choice-of-law rules involve public and private dimension. The public dimension or aspect concerns serving the interest of the countries involved, while the private aspect concerns the interest of the parties and the justice of the case⁴⁸⁴.

While choice-of-law rules undertake their primary task in identifying the applicable law, these rules fulfil other goals which might not be as obvious and straight forward as the primary objective. New Zealand law Commission⁴⁸⁵ discussed the objectives of PIL in general and referred in its discussion to the goals of conflict rules as to:

⁴⁸² The number of studies dedicated to address objectives of choice-of-law rules and its relationship with substantive law is considerably limited in comparison to the number of available studies dedicated for other issues in conflict-of-laws.

⁴⁸³ Clarkson and Hill, 2006, p 493.

⁴⁸⁴ Clarkson and Hill, 2006, p 494.

⁴⁸⁵ Report 50 Electronic Commerce Part One (October 1998) para 252; Svantesson, 2007, p 60 (fn 9).

... avoid multiple hearing of the same dispute, to ensure the system of the chosen law does not depend on where the case is heard; so if choice of law rules even though in different jurisdiction referred to the same law we will no longer have forum shopping⁴⁸⁶

Therefore, as conflict rules carry out their primary function in determining the applicable law, they also guarantee application of a single law regardless of where the case is brought and accordingly prevent forum shopping. This comes in conformity with the main goal of choice-of-law as Savigny and Beale see it, which is uniformity of decisions⁴⁸⁷. Moreover, conflict-of-laws as a branch of private law, aim at promoting interests of the private persons and achieving legal certainty.⁴⁸⁸

Other objectives of conflict rules also include '...the fulfillment of the underlying policies behind the substantive law'⁴⁸⁹, fulfillment of interests and aims the national legislator wishes to achieve⁴⁹⁰, and promoting fulfillment of public policy considerations that motivate the substantive law they relate to⁴⁹¹.

Thus, the *link* between choice-of-law rules and substantive law is evident. This link is translated in employing conflict rules as a tool or a medium to achieve the underlying policies of substantive law. This was made clear in New Zealand Law commission report: 'As for New Zealand; its PIL rules aim at ensuring efficient resolution for cross-border disputes and protecting New Zealand's

⁴⁸⁶ Svantesson, 2007, p 60 (fn19).

⁴⁸⁷ Mehren, 1975, Am. J. Comp. L. 751 or as put by Forsyth '...the achievement of harmony of decision is a major purpose of the conflict of laws' Forsyth, 1998, LQR 158

⁴⁸⁸ Collier, 2001, 385.

⁴⁸⁹ Svantesson, 2007, p 59.

⁴⁹⁰ Castel, 1978, pp 1-2.

⁴⁹¹ In doing so, the legislator must take into account domestic and international considerations, see Svantesson, 2007, p 75.

interests in the domestic and international level as part of the international community⁴⁹².

As a matter of fact, several commentators embrace this approach. Wengler for example lists 6 general principles that one needs to keep in mind when forming PIL rules, the forth of which is '...(4) use of the choice – of – law reference that best serves the purpose of the substantive law...'⁴⁹³

Moreover, 'false conflict' as a result to uniformity of substantive laws is another evidence of how the function of choice-of-law rules is affected by substantive law. Attempts to harmonize copyright law for example, on the substantive level, should eventually lead, at some point in the future, to the same result regardless of which law applies. Hence, reflecting what is known as false conflict of laws, where there is no actual conflict between the potentially applicable laws because they all lead to the same substantive result⁴⁹⁴.

This active interaction between choice-of-law and substantive law means that the similar purpose or objective author's moral rights share with general personality rights *on the substantive level* cannot be overlooked in conflict-of-laws. When the function of two rights is similar, purpose of substantive law of both rights is also expected to be similar. As a result, the 'seat' in both sets of rights should not be different.

Hence, drafting specifically designed choice-of-law rules to moral rights should take into account the link these rights share with personality rights on the substantive level. Furthermore, there are certain desired qualities which one needs to keep in mind in order to fulfil particular functions⁴⁹⁵. This includes

⁴⁹² Svantesson, 2007, p 60 (fn19).

⁴⁹³ Cited in Svantesson, 2007, p 62.

⁴⁹⁴ For more details on 'false conflict' see Geller, 1995, pp 321-322.

⁴⁹⁵ These qualities and functions are not limited to choice-of-law rules as these rules are part of general PIL rules, desirable qualities of PIL rules in general also include qualities that should be associated with conflict rules; generally see Svantesson, 2007, pp 58-90.

meeting the parties' legitimate expectations. The importance of bearing this principle in mind as a desirable quality when drafting a choice-of-law rule is obvious. If this interest is taken into account, it should lead to fair results and justice. When addressing legitimate party expectation, special attention should be given to the '... position of the parties in an international situation and on their justified expectation, especially when exposed to an unexpected choice of law in an unforeseeable forum' ⁴⁹⁶. Choice-of-law rules also need to be flexible, to ensure that the rule can adapt to the facts of the case in question, and hence achieve fair, reasonable and just results⁴⁹⁷. In addition, these rules should promote efficiency. Efficiency can be measured in several ways, most basic of which is considering time and cost as well as convenience of the parties⁴⁹⁸. And as the case with any legal rule, choice-of-law rules must be as simple as possible drafted in clear and understandable language. ⁴⁹⁹

Arrangements of these considerations may differ from one commentator to another, for Leflar the most important considerations that influence formulating a choice-of-law rule are 'A. predictability of results B. Maintenance of interstate and international order C. simplification of judicial task D. advancement of the forum's governmental interests E. application of the better rule of law'⁵⁰⁰

As for Wengler, there are 6 general principles that one needs to keep in mind when drafting PIL rules:

- (1) Public policy; (2) the forum's 'political' (governmental) interest;
- (3) sub-stantive 'harmony' [...]; (4) use of the choice – of – law

⁴⁹⁶ Svantesson, 2007, p 64 citing F. Vischer, 'General course on PIL' (1992-I) 232 *Recueil des cours*, 94, see (fn 36). Collier, 2001, p 377.

⁴⁹⁷ Svantesson, 2007, p. 67

⁴⁹⁸ Svantesson, 2007, p 78.

⁴⁹⁹ Svantesson, 2007, p 79.

⁵⁰⁰ Cited in Svantesson, 2007, p 61.

reference that best serves the purpose of the substantive law; (5) enforceability of the decision; and (6) the principle that conflicts should be minimized (harmony of decision amongst states)⁵⁰¹

Nevertheless, what it is important to bear in mind is that these qualities differ from one situation to another. This is particularly true in relation to predictability and flexibility as the two qualities should not be equally treated in cross-border contracts and torts.

In relation to contracts, sophisticated contracts like the ones concluded between multi-billion dollars industry require higher level of predictability and low level of flexibility because these contracts are planned and legally reviewed by lawyers. In relation to unsophisticated contracts, what is required is high level of flexibility and low level of predictability. The same rule applies if a contract is concluded between a sophisticated party and unsophisticated party. This is because if priority is given to predictability then we will be serving the expectations of the sophisticated (usually stronger) party of the contract⁵⁰².

In relation to torts, predictability is important to the defendant and flexibility is important to the plaintiff. In torts where predictability and flexibility clash, priority must be given to predictability. Fuller's observation can be recalled here where he described failure to meet the affected party's legitimate expectation as 'a route to disaster'⁵⁰³

3. Interim conclusions

A certain law is presumed to be the most suitable to govern the issue at question for several reasons, these reasons are extracted based on a certain theory. Hence,

⁵⁰¹ Cited in Svantesson, , 2007, p 62.

⁵⁰² Svantesson, 2007, p 69.

⁵⁰³ Svantesson, 2007, pp 73- 74.

theories on conflict-of-laws are important so that one could understand how choice-of-law rules are drafted. The most commonly used method today is the 'allocation method', therefore, any suggested rule should take this theory into consideration.

In a cross-border dispute there are two or more potentially applicable laws, the primary and most obvious objective of a choice-of-law rule is to select a single law out of all these laws to be applied to the dispute at question. Yet, one would be mistaken to believe that the importance of choice-of-law rules to the national legislator is limited to this primary objective. These rules are used by the legislator as a tool to achieve the policies of substantive law, thus, resulting in an interactive relationship between substantive law and conflict-of-laws.

B. Moral rights, copyright and general personality rights: identifying common elements in conflict-of-laws

It is important to keep in mind that the general right of personality of the author will not be protected under the traditional concept of moral rights, this is because the latter set of rights only apply when the interests involved are in relation to a copyrighted work⁵⁰⁴. And for that very particular reason, moral rights could only be considered as special category of general personality rights. Therefore, personality rights are to be divided into general personality rights that apply to all natural persons (authors and non – authors) and special personality rights that only apply to authors and performers⁵⁰⁵.

As explained earlier, most countries in the world -including the EU- apply the allocation method, according to which legal issues are assigned to certain categories. Each category applies a certain choice-of-law rule, this rule is expected to select the law which should be most closely connected to legal issues falling within this particular category. Therefore, moral rights' link with both copyright and general personality rights should –accordingly- be taken into account. The theoretical justification for the allocation method, together with its already existing international acceptance, encouraged the current writer to follow the international direction and adopt the allocation method as the theoretical

⁵⁰⁴ Dietz, 1994, IIC 181.

⁵⁰⁵ Providing certain category of natural persons with additional protection is not novel approach, rather the approach is quite common when it comes to natural persons classified as weak or vulnerable such as children and women who enjoy special care and protection in addition to their general human rights. For example the Convention on the Rights of the Child, New York 20 November 1989. In these situations, there doesn't seem to be an objection against providing extra form or level of protection to these classes of natural persons because of the peculiarity of their situation. Accordingly, to simply reject the mere idea of categorizing moral rights as special form of general personality rights just because it means that authors will enjoy special form of protection in addition to the general personality rights they enjoy is a view that should be re-considered.

basis for her new proposal. Hence, it is important to identify the common elements that moral rights share with copyright and personality rights. This identification should help determine the category under which moral rights should be listed and accordingly the suitable choice-of-law rules.

1. Elements connecting moral rights with copyright in conflict-of-laws

The fact that the birth point of moral rights is determined by the existence of the copyrighted work cannot be underestimated. Thus, a conflict rule that is to be applied to moral rights should take this factor into consideration. Any legal issue that is related to the question of existence of moral rights should logically be governed by the same law applicable to existence of copyright. Here, the connection between moral rights and copyright is very strong because existence of moral rights *depends* on the existence of the copyrighted work. Therefore, if one theoretically accepts that existence of copyright is determined by *lex originis*, then the same law should also determine existence of moral rights. Furthermore, it is not to be forgotten that the conventional approach is to have existence and scope governed by the same law.

2. Elements connecting moral rights with general personality rights in conflict-of-laws

The connection between moral rights and general personality rights is in relation to the 'functionality' of both rights. 'Functionality' is derived from function, the latter term is defined in the Oxford Dictionary as 'Aim, job, purpose, use or role' therefore, moral rights and general personality rights are *purposely similar*. Thus, issues related to the functionality or the aim and objective of moral right are closely related to general personality rights. In this particular regard, the law applicable to both should be similar or at least derived from a similar choice-of-law rule.

In general, all issues related to moral rights are part of the functionality of these rights. However, this should not mean that all legal aspects and issues in a cross-border moral rights dispute are only connected to general personality rights. To clarify this further, imagine the following: (A) is a French composer who agrees to contractually waive all his moral rights in relation to his musical piece to an English producer (B). The contract is governed by English law, and the work (being the musical piece) is broadcasted in France, Spain and England. (B) makes some changes to the work without consulting (A) because the latter has sold his economic and moral rights in the work to (B). (A) brings an action before French courts arguing that these changes infringe his integrity right and that the general waiver is null and void, thus requesting the prevention of broadcasting the musical piece in its amended form.

In this case, the contractual waiver (general waiver) of moral rights is a contractual issue rather than an issue of functionality. Nevertheless, the answer is far from being either black or white, this is because one should differentiate between validity of the contract from a formality point of view, and validity of the subject matter of the contract. If the issue concerns formal validity of the contract then it is purely a contractual issue and the functionality and purpose of moral rights play no role, however, if the issue concerns the validity of the protected subject matter as illustrated in the example above, then the issue is once again intersecting with functionality and purpose of moral rights which will eventually lead to general personality rights.

In relation to infringement scenarios, the issue is related to functionality and purpose of moral rights, for example, cross-border infringement of the attribution right is by definition an attack on the author's name. Protection of this interest – in addition to other moral interests- is the purpose or aim of moral rights and the whole point behind its existence. Again, the function or purpose of moral rights in this sense intersects with that of general personality rights.

Hence, only in relation to cross-border infringements 'functionality' becomes an evident element that should not be overlooked in conflict-of-laws. Thus, the connection between moral rights and general personality rights must be recognized when dealing with moral rights infringements. As for moral rights in cross-border contracts, it is important to differentiate between disputes related to

the formality of the contract (in which case it is purely a contractual matter), and disputes related to the protected subject matter in a contract (in which case functionality of moral rights is involved).

Moreover, as infringement falls under the category of 'non-contractual' obligations, the place where damage was suffered is considered to be a significant factor. The result could therefore be application of the universally acknowledged principle of *lex loci delicti*⁵⁰⁶. Thus, moral rights infringements shall also be evaluated against its general categorization as a non-contractual obligation.

At this stage, detailed examination for each moral right should be helpful. The attribution right protects *author's name in relation to his work*. Infringement occurs when the work is communicated to the public with false or no attribution to the actual creator of the work. The right is 'personality – related', hence it is assumed to be very closely connected to the author's personality. Thus, the applicable law should not ignore this important factor. In addition, *where* the work was communicated to the public in its infringing form marks the decisive point regarding infringement or breach of moral rights.

The integrity right protects *author's honor and reputation in relation to his work*. The protected interest i.e. author's integrity is related to his personality, this is true although 'integrity' is only limited to his work. When this work is communicated to the public in its derogatory form, it is expected to harm the author's reputation and honour. Where this harm takes place together with the personality related nature of the protected interests, are two significant factors that should not to be ignored.

The divulgence right is not different from the attribution or integrity rights in terms of its connection with general personality rights. The right protects the author's privacy right in relation to his work, so that the author can control when and how to publish his work to the public. Thus, the divulgence right is derived

⁵⁰⁶ Rome II Regulation adopted the place of injury approach as it reflects the most closely connected law; Kramer, 2008, p 12.

from the privacy right, infringement therefore takes place when the work is communicated to the public without the author's consent.

Analysis of the common factors moral rights share with general personality rights shows that, the author and where the infringing act takes place, are two significant factors when it comes to determining the applicable law in cross-border moral rights infringement.

3. Interim conclusions:

Choice-of-law rules are not carelessly drafted. According to the 'allocation method', legislators must first thoroughly examine all elements of the legal relationship, as a second step, these elements are evaluated and compared to determine the one element that is most significant. Once this element is located, the connecting factor is drafted and the applicable law would be that which is connected to the element most significant in the legal relationship.

As moral rights are connected to both copyright and general personality rights, this connection should be reflected on choice-of-law rules. The connection with copyright is most significant in relation to the question of existence, and therefore, the law applicable to determine whether copyright exists or not should also determine existence of moral rights.

At the same time, the common significant element that general personality rights share with moral rights is related to its functionality, a matter that is clearly reflected in infringement situations. Importance of the author as a factor in moral rights infringement cases comes from the fact that what is infringed or violated is related to the author's personality. The 'author's personality' as a factor, is of crucial importance and should not be overlooked. The place where the author suffered damages is another crucial factor derived from the fact that infringement of author's moral rights falls within the category of non-contractual obligations. Accordingly, the place of the event either giving rise to the damage or where the damage was suffered counts as considerable factors.

C. Personality rights and conflict-of-laws: Critique of the recent EU proposals

The recent developments concerning personality rights in conflict-of-laws at the EU level are important to moral rights. This is because the link moral rights have with general personality rights should be reflected in choice-of-law rules.

Therefore, a reminder of the present situation regarding applicable choice-of-law rules to general personality rights is needed, followed by a critique to the recent EU proposals concerning the applicable choice-of-law rules to general personality rights.

1. The status Quo:

Personality rights are excluded from the scope of Rome II. The issue proved to be too controversial to reach an agreement and therefore was explicitly excluded from the Regulation. Some commentators like Mr. Iain Christie believes that it is not of great importance that a choice-of-law rule regarding personality rights was not included in the Rome II Regulation. His acceptance to the situation is based on his belief that eventually there will be a unified European standard for defamation and privacy laws in all Member States:

The impetus for both these adjustments has been the European Convention on Human Rights. As the Convention standards impact across Europe the divergence between the defamation and privacy laws of all member states will reduce. In time it will matter less which law applies and decisions on where to sue are likely to be influenced more by practical considerations such as the location of witnesses and likely costs of the action. The absence of specific clauses dealing with the violation of personality rights in the latest draft of Rome II (and the retention of the status quo for the time being) is not, from a practitioner's perspective, therefore of paramount importance⁵⁰⁷

⁵⁰⁷ Iain Christie, 'Applicable law to the violation of personality rights – a quest for reasonableness?' available online <dianawallismep.org.uk/en/document/media-seminar-oct-06/christie.doc> last accessed 4 Sep 2012, p 9 (hereafter referred to as Christie).

Nevertheless, the majority sees the exclusion as a disadvantage and a weak point in the Rome II Regulation. This is attributed to the un-unified position of general personality rights in conflict-of-laws, which as a result, leaves each country to deal with the matter according to its own national rules.

Accordingly, in England for example, The Private International Law (Miscellaneous Provisions) Act 1995 looks at the place where the events constituting the tort occurred⁵⁰⁸. The Act provides that in any case (other than damage to property) the applicable law is the law of the country in which the most significant element or elements of the events occurred⁵⁰⁹. Nevertheless, defamation is excluded from Part III of the Act⁵¹⁰, the reason behind this exclusion from the scope of the Act is the lobbying power of the media. Publishers and broadcasters argued that if defamation was under the scope of the (Miscellaneous Provisions) Act 1995 then the 'double actionability' rule will not apply, which means that publishers or broadcasters established in the United Kingdom would be subject to defamation proceedings under a foreign law that provided them with weak protection. The subject seemed to be very problematic and therefore defamation was excluded from the scope of the 1995 Act, hence, the 'double actionability' rule still applies with regard to defamation⁵¹¹.

⁵⁰⁸ For more details see Christie, p 8.

⁵⁰⁹ Private International Law (Miscellaneous Provisions) Act 1995 s 11 (2).

⁵¹⁰ Private International Law (Miscellaneous Provisions) Act 1995 s 13.

⁵¹¹ For more details see Jan-Jaap Kuipers, 'Towards a European Approach in the Cross-Border Infringement of Personality Rights', 12 German Law Journal 1681-1706 (2011), available at <<http://www.germanlawjournal.com/index.php?pageID=11&artID=1379>> last accessed 26 Sep 2012, p 1697 (hereafter referred to as Kuipers, 2011).

2. The applicable choice-of-law rules to general personality rights: Recent EU proposals

Most scholars criticize exclusion of general personality rights from the scope of Rome II Regulation. As this approach is understood to weaken the Regulation, scholars tried to come up with suggestions and proposals that would bring general personality rights into the scope of the Regulation. The following are important proposals that contributed to the recent EU developments regarding personality rights in conflict-of-laws.

a. Suggested choice-of-law rules to be applied to personality rights at the EU level:

As explained above, exclusion of personality rights from the scope of Rome II Regulation is considered by many commentators to be one of the Regulation's main weak points. Yet, one should not forget that attempts to include personality rights in the scope of the Regulation proved to be a very difficult matter. The first draft commission proposal for Rome II Regulation suggested applying the law of the place where the victim was domiciled at the time of the tort or delict. However, the proposal was rejected because of the lobbying power played by the media refusing to have broadcast and print media subject to a foreign law. In short, it was impossible to reach a compromise, and accordingly the only way was to leave the issue outside the scope of the Regulation⁵¹².

Despite these difficulties, most commentators believe that inclusion of personality rights in the scope of the Regulation is important⁵¹³. Several

⁵¹² For more details see Kuipers, 2011, p 1692.

⁵¹³ The *Mainstrat* Study (a comparative study on the situation in the twenty-seven Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality) shows great support for the harmonization of the law

proposed solutions to the situation were presented, these include the following⁵¹⁴:

i. *Wallis working paper and Von Hein's paper*:

Both call for providing a specific regulation that is designed to deal with breach of privacy and defamation in Rome II. Both papers suggest that the applicable law to privacy and personality right should be the location of the injured party's habitual residence⁵¹⁵ as primarily decisive and this is then combined with a foreseeability rule.

ii. *Boscovic*:

Professor Boscovic also supports including personality rights under Rome II. However, she suggests deleting the exception in Rome II art 1 (2) (g) and simply applying art 4 of Rome II.

iii. *Dickinson and Harley*:

Suggest leaving the situation as it is for the time being.

iv. *Professor Heiderhoff*:

Suggests application of *lex fori*, she argues that application of *shevill* solution to choice-of-law is not possible because we will end up giving the plaintiff the right to choose the forum and the law⁵¹⁶. The best solution in her view is to apply *lex*

applicable to defamation: 85% of the persons consulted, mainly legal practitioners supported adopting uniform conflict of laws rule; see Kuipers, 2011, p 1696.

⁵¹⁴ George, 2010, p 1 under pt 1.

⁵¹⁵ For a detailed examination of habitual residence compared to domicile see Pippa Rogerson, 'Habitual residence: the new domicile?' [2000] ICLQ 86-107 (hereafter referred to as Rogerson, 2000).

⁵¹⁶ However, the French court in *Gordon & Breach Inc.* (1998) 175 RIDA 268, ruled that *the law of the place where the harmful event occurred* is to be understood to be both the place where the harm was suffered and where the event generating the harm took place, cited in (2002) 193 R.I.D.A. 340.

fori, in this way she argues '... the application of foreign law in a legal field, where cultural differences truly exist, is completely proscribed' ⁵¹⁷ Professor Heiderhoff explains that countries with fundamentally different approach to the subject like France and England should *not* be forced into parallel standards⁵¹⁸.

v. *Dr. Kuipers*:

Suggests the application of the closest connection principle to cross-border defamation cases. Dr. Kuipers believes that flexibility and giving more room to courts should be given more importance than predictability⁵¹⁹. The principle of closest connection was used in Rome Convention (art 4), however, it was criticized because it was considered a source of uncertainty. Yet, Dr. Kuipers understands this uncertainty not to be related to the principle as such but to the way courts interpreted it⁵²⁰. Factors to be taken into account when determining the country with the closest connection to the dispute include: the place of establishment of the publisher, the place of establishment of the victim, the place where most of the damage materialized, place where most publications were put into circulation, the international or local nature of the publication, the language of the publication, the audience for which the publication was written, and in cases of defamation via the internet, importance should be given to the domain name of the internet site⁵²¹.

Dr. Kuipers draws attention to the benefits of applying the principle of closest connection. These benefits include application of a single law to a

⁵¹⁷ George, 2010, p 2 under pt III.

⁵¹⁸ George, 2011, p3 under pt IV.

⁵¹⁹ Kuipers, 2011, pp 1701-1702.

⁵²⁰ Kuipers, 2011, p 1702.

⁵²¹ Kuipers, 2011, p 1704.

publication, and application of the same rule to traditional and online defamation scenarios. Moreover, the closest connection principle is expected to strike the needed balance in disputes involving laws of non Member States, accordingly EU laws and values will only be applicable when the defamation has the closest connection with one of the Member States⁵²². Therefore, Dr. Kuipers suggests the inclusion of the following rule into the Rome II Regulation: 'The law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, shall be the law of the country with which it is most closely connected.'⁵²³

In this writer's opinion, Dr. Kuipers view is probably the most favoured out of the above mentioned proposals. 'The closest connection' principle is general and flexible enough to give room for courts to deal with cases on individual basis. Uncertainty can be avoided when the rule is supported with a list of certain factors that would help the court in its determination process. Moreover, the place 'where the most significant element of the loss or damage occur' should certainly be taken into consideration when determining 'the closest connection'. And as a result, the place with the closest connection could be the same as that of the place where the most significant element of the loss or damage occur or likely to occur. In addition, Dr. Kuipers proposed rule is general enough to be applied to traditional scenarios and online (ubiquitous) infringement scenarios. Nevertheless, in this writer's opinion, the proposed rule under the Final Report of the European Parliament (discussed directly below) is preferable over Dr. Kuipers' proposal. This is because the rule under the Final Report takes into consideration the positive factors in Dr. Kuipers' proposal, while providing higher level of precision and certainty.

⁵²² Needless to say, the Public policy exception can always be used to refuse the application of foreign law if it was contrary to the fundamental principle of the forum. Kuipers, 2011, p 1704.

⁵²³ Kuipers, 2011, p1705.

b. Reports of European Parliament on Future choice-of-law rule for privacy and personality rights:

As explained earlier, the majority of commentators believed that it was necessary to include personality rights within the scope of Rome II. The Draft Report of European Parliament was of significant importance as it was followed by the Final Report on future choice-of-law rule for privacy and personality rights.

i. Draft Report of European Parliament on Future choice-of-law rule for privacy and personality rights⁵²⁴:

The Draft Report was a working document prepared by Diana Wallis⁵²⁵. The initiative for this working document was mainly a consideration for the current situation

...because the Council was unable to agree on the original Commission proposal or on the compromise solution put forward by Parliament in the course of the co-decision procedure on the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality.⁵²⁶

Diana Wallis argued that a conflict rule concerning personality right is necessary and that Prof Jan Von Hein proposal was the most interesting. In fact, the Draft

⁵²⁴ Draft report (2009/2170(INI)) to the commission on the amendment of Regulation (EC) No864/ 2007 on the law applicable to non-contractual obligations (Rome II) dated 2/12/2011 Available at <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/pr/885/885652/885652en.pdf>

accessed 27 Nov 2011; also reported on <<http://conflictoflaws.net/2011/new-draft-report-of-european-parliament-on-future-choice-of-law-rule-for-privacy-and-personality-rights/>> accessed 1 Dec 2011 (hereafter referred to as Draft Report).

⁵²⁵ Diana Wallis (rapporteur), 'Working document DT\836983EN.doc on the amendment of Regulation (EC) NO 864/2007 on the law applicable to non – contractual obligations (Rome II) – Work in Progress' [2011] (hereafter referred to as Wallis, 2011).

⁵²⁶ Wallis, 2011, p 2.

Report clearly adopted Prof Von Hein's proposal. Thus, the proposed article was titled 'Article 5a-Privacy and rights relating to personality', it provides for the following:

(1) Without prejudice to Article 4(2) and (3), the law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, shall be the law of the country where the rights of the person seeking compensation for damage are, or are likely to be, directly and substantially affected. However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee substantial consequences of his or her act occurring in the country designated by the first sentence.

(2) When the rights of the person seeking compensation for damage are, or are likely to be, affected in more than one country, and this person sues in the court of the domicile of the defendant, the claimant may instead choose to base his or her claim on the law of the court seised.

(3) The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.

(4) The law applicable under this Article may be derogated from by an agreement pursuant to Article 14.

Diana Wallis commented on this proposal saying:

This proposal couples the basic principle that the law of the place where the damage occurs is paramount, but couples it with a foreseeability clause to take the legitimate interests of publishers into account ... There is also provision for party autonomy and the option of electing to apply the lex fori where the claimant elects to sue in the publisher's courts for damage sustained in more than one Member State.⁵²⁷

⁵²⁷ Wallis, 2011, p 5.

- ii. Final Report of European Parliament on Future choice-of-law rule for privacy and personality rights⁵²⁸:

In May 2nd, 2012, the Committee on Legal Affairs of the European Parliament has issued its Final Report with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II). When the Final Report was published in May 2012, there was re-consideration for the terminology used in the Draft Report. The Final Report proposes the inclusion of the following article:

Article 5a: Privacy and rights relating to personality

1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, including defamation, shall be the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur.
2. However, the law applicable shall be the law of the country in which the defendant is habitually resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by paragraph 1.
3. Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors.
4. The law applicable to the right of reply or equivalent measures and to any preventive measures or prohibitory injunctions against a publisher or broadcaster

⁵²⁸ Hereafter referred to as Final Report.

regarding the content of a publication or broadcast and regarding the violation of privacy or of rights relating to the personality resulting from the handling of personal data shall be the law of the country in which the publisher, broadcaster or handler has its habitual residence.

iii. Draft Report vs. Final Report: comparison and analysis

The difference between the Draft Report and the Final Report calls for a comparison between the two proposed articles.

In relation to infringement of privacy and rights related to personality, the general rule in the Draft Report is application of the law of the country where the rights of the person seeking compensation for damage are, or are likely to be, directly and substantially affected. In the Final Report, the general rule is application of the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur.

In relation to infringement of privacy and rights related to personality taking place in more than one country, the general rule in the Draft Report is to allow the claimant to base his claim on the law of defendant's domicile (if he decides to sue him there), or to base his claim on the law of the court seised. However, according to the Final Report, where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors.

As for the possibility of derogation from the proposed applicable rule, the Draft Report allows derogation by an agreement between the parties pursuant to art 14. However, the Final Report does not allow derogation from its rule.

The common factor between the Draft Report and Final Report is the use of flexible general rule that is suitable for application to infringement scenarios taking place in one country and infringement scenarios taking place in more than one country.

The Draft Report calls for application of the law of the country where the rights of the person seeking compensation for damage are, or are likely to be, directly and substantially affected. On the other hand, the Final Report calls for the application of the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur. In this writer's opinion, the rule in both proposals is expected to eventually lead to the application of the same law. This is because the most significant element or elements of the loss or damage is likely to occur where the rights are directly and substantially affected. For example, if (A) brings an action against (B) because the latter published a private family photo of (A) in London hence violating his privacy right, the most significant element of the loss occur or is likely to occur in London where the photo was published and this is where the right (being the privacy right) is directly and substantially affected. If (A) proves that his interest was directly and substantially affected in France not in London, then, France is the place where the most significant element or elements of the loss or damage occur or are likely to occur, and accordingly French law should be applied.

Despite the potentiality of application of the same law under the two proposed articles, the terminology used in the Final Draft gives the court wider discretionary power. Moreover, application of the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur, gives more flexibility in relation to infringement taking place in more than one country. In such case, the place where the most significant element of the loss is considered to be that of the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable. The country to which the publication or broadcast is

directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors. Nevertheless, and despite the advantages of this rule, it could be criticised on the ground that it is more favourable for the media industry. This is because the place where the most significant element of the damage or loss would be that which the broadcast was directed at, or where the editorial control was exercised, thus, putting the media in a controlling position.

Yet, a closer look at the current proposal under the Final Draft, shows great deal of similarity to Dr. Eechoud's '*effective places of use*'⁵²⁹ rule, a rule which she proposes to apply to simultaneous infringement scenarios.

3. Interim conclusions:

The internet and other means of technology made personality rights – just like other rights and interests- subject to cross-border disputes. The question of applicable law to personality rights caused great deal of distress and disagreement among Member States, the result was its exclusion from the scope of the Regulation.

However, ignoring personality rights in conflict-of-laws is no longer possible. Consequently, several proposals were presented to include personality rights within the scope of the Regulation. These proposals along with the Final Draft Report of European Parliament on Future choice-of-law rule for privacy and personality rights are very important and relevant to this writer's new proposal, as she intends to propose choice-of-law rules that recognize the connection moral rights share with both copyright and personality rights accordingly.

⁵²⁹ Discussed directly below in Chapter II.

Chapter II

A New Proposal

The particular nature of moral rights, the interests these rights aim at protecting, the similar functionality moral rights share with general personality rights and the problems associated with *lex loci protectionis*, are all significant factors that support the argument in favour of having particularly designed rules for moral rights.

As this chapter is the final chapter of the thesis, the research has been completed and a 'new proposal' is to be presented. The 'new proposal' intends to take all research results into consideration, as the ultimate and final goal is to allocate the most suitable choice-of-law rule to moral rights in cross-border torts and in cross-border contractual obligations.

A. Moral rights in cross-border torts

1. Proposed rules:

Firstly, the applicable law to authorship and initial ownership should be the law of the place of habitual residence of the actual creator of the work when the work was created. Since authorship and initial ownership should be determined according to one single law, it makes no difference whether the issue is raised in the context of infringement or not.

Secondly, the applicable law to existence of moral rights, their scope and duration, raised in *non*-infringement scenarios, should be the law of the place of habitual residence of the actual creator of the work when the work was created. It is worth pointing out that the proposition to apply law of the place of habitual residence of the actual creator of the work to determine existence of moral rights, is also suggested be applied to determine existence of copyright. In this case, existence of copyright and moral rights will be subject to the same rule.

Thirdly, the law applicable to infringement of moral rights, including questions of existence, scope and duration that are raised during the process, should be the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur. However, the law applicable shall be the law of the country in which the defendant is habitually resident if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by paragraph.

Fourthly, if infringement of moral rights took place in more than one country by the publication of printed matter or by a broadcast, including ubiquitous infringement of moral rights, then, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is

exercised, and that country's law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors.

Therefore, this writer is in favour of including article 5a (in its final proposed form) in the Rome II Regulation as a first step. Moreover, she proposes drafting a particularly designed choice-of-law rule that is similar to article (5a)⁵³⁰ in relation to infringement of moral rights.

2. Analysis:

There are two important principles that need to be highlighted. The first is that as a general rule, the actual creator of the work is its copyright owner. The second is that identification of the author of the work and its copyright owner should be according to one single law. Hence, it makes perfect sense to reject application of *lex protectionis* to define authorship, as its application leads to the possibility of having different authors for the same work whenever it crosses borders. The new proposal, calls for application of the law of the place of habitual residence of the actual creator of the work when the work was created to determine

⁵³⁰ Note that attachment of moral rights to the characterization model of general personality right in conflict-of-laws is expected to have an effect on choice of court agreement under the Hague Convention on Choice of Courts Agreements (2005). This is because art 2(1) excludes from the scope of its application natural persons acting primarily for *personal* purposes. Therefore this raises the question of whether a choice of court agreement concluded between two parties one of which is an author, with regard to the latter's moral rights in his work, would such choice of court agreement be excluded or allowed? This is particularly problematic as the answer differs depending on whether moral rights are understood to be for *personal* purposes or not. If moral rights were not considered personality rights, then The Hague convention is applicable and a clearly chosen court will have jurisdiction to hear the case based on art 5(1). Any other court besides the nominated court seized of the case has to decline jurisdiction (art 6). General examination of the Hague convention see Thalia Kruger, *Civil Jurisdiction rules of the EU and their impact on third states* (Oxford University Press, Oxford 2008) 45-47 (hereafter referred to as Kruger).

authorship and initial ownership. For example, let us imagine the following scenario: the work in question is a novel and the author is a Canadian national who was habitually resident in Canada when the novel was written, however, he was habitually resident in England when he brought his case against the defendant. According to the proposed rule, the law applicable to determine authorship and initial ownership should be Canadian law not English law.

The main advantage in applying the law of the place of the creator's habitual residence at the time the work was created is that it applies equally to published and unpublished works. In addition, habitual residence – as will be explained below- is a compromise between the concept of domicile adopted by common law traditions and the notion of nationality adopted by civil law traditions, in that sense habitual residence reduces the gap between the two systems and certainly leads to more realistic and predictable results⁵³¹. It is important to point out that consideration of habitual residence of the actual creator of the work when the work *was created*, is expected to avoid the impracticality and risk exploiters could face as their conduct may become impermissible when the author changes residence⁵³². Moreover, exclusion of the application of current habitual residence is rational since one cannot *reasonably foresee* change of habitual residence.

In relation to existence, scope and duration of moral rights (in non-infringement scenarios), the search is naturally for the law with the real connection to the dispute. As these issues are raised in a non-infringing scenario, the strongest candidate to determine whether the right exists or not, and if so to what extent, is the law of the place of habitual residence of the actual creator of the work when the work was created. Accordingly, application of the proposed rule means that the same law will determine question of initial ownership, authorship, existence, scope and duration of moral rights (raised in non-infringement scenarios).

⁵³¹ Generally on habitual residence see Clarkson and Hill, 2006, pp 43-51.

⁵³² This was the objection to author's residence as a connecting factor under ALI Draft No.1, cited in Gottschalk, 2007, p 207 (fn 108).

Cross-border infringements of moral rights, including questions of existence, scope and duration which are raised during the process, are to be *attached* to general personality rights in conflict-of-laws. The basis of attachment is the similar functionality moral rights share with general personality rights. When infringement occurs questions of existence of the right, its scope and duration are raised, hence, the scope of law applicable to the infringement issue should also cover these questions. The place where *the most significant element or elements of the loss or damage occur or are likely to occur* is where the actual creator's rights are directly or substantially damaged -or are likely to be so. This place is certainly of significant importance to the defendant as it is the place where his loss occurred or likely to occur. Furthermore, existence, scope and duration of copyright in infringement scenarios reflect the balance that countries try to strike between interests of authors and that of the public⁵³³. In other words, the state has an interest in striking a balance between the freedom of the public to use and modify the work vs. the author's right to prevent them from doing so. This justifies application of the law of this particular place to determine whether the right exists at the first place or not, and if so then its scope and infringement conditions. The proposal to subject the same set of issues to two different choice-of-law rules is probably contrary to the conventional approach. Nevertheless, it is justified in this writer's opinion because the related interests in infringement situations are different from those in non-infringement situations, namely, the state's interest in striking a balance between private and public interest which is only triggered in infringement scenarios.

As for infringement taking place in more than one country including ubiquitous infringement, the general rule which is application of 'the law of the place where the most significant element or elements of the loss or damage occur or are likely to occur', is a flexible rule that is suitable for traditional infringement scenarios as well as ubiquitous infringement scenarios. However, there is a possible trouble with application of this general rule to ubiquitous infringement

⁵³³ Eechoud, 2003, p 210.

situations, which is application of multiple laws at the same time. This is attributed to how 'the most significant element or elements of the loss or damage' could have taken place in more than one country. Thus, to avoid application of multiple laws, a presumption was needed and thus, the country to 'which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, then that country's law shall be applicable'. There are important factors that would help determine whether publication or broadcasting is considered principally directed towards a certain country or not, this includes 'the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors'. However, if these factors were not clear then law of 'the country in which editorial control is exercised' will be applied.

For example, if a painting is displayed without attribution to its actual creator on a website, and the website is in Spanish, with Spanish advertisements for products that are mostly known in the Spanish market. In this scenario, it is explicit that the online publication is principally directed to Spain (or probably to Spanish speaking audience). Therefore, Spanish law applies if it was proven that Spain was the country with the largest audience. Yet, if this was not apparent, then the law of the country in which editorial control is exercised shall be applied.

Application of *lex loci protectionis* to simultaneous infringement has not been favored by commentators like Dr. Eechoud. She argues that in simultaneous infringements scenarios only 'effective places of use'⁵³⁴ are to be considered when determining the applicable law both concerning the unlawfulness of the act and consequences of infringement⁵³⁵. The advantage of this 'effective – use'

⁵³⁴ 'In reality the places of use that matter are where the right owner's effective capacity to exploit the copyright or related rights are injured, or -in the case of moral rights- where the reputation of the author is harmed' Eechoud, 2003, p 223.

⁵³⁵ Eechoud, 2003, p 208.

approach is that it reduces the potentially applicable laws. If there is no effective use in the country it will have no interest in applying its law since the local balance between private and public interest is not endangered⁵³⁶. The 'effective – use' method is a practical method with less difficulties, therefore, if a moral right was infringed in one jurisdiction the law of that jurisdiction will be applied, if a moral right was infringed in 10 jurisdictions, 4 of which are of an 'effective – use' to the author, then only laws of these 4 jurisdictions will be considered⁵³⁷.

In this sense, it is clear that the 'effective places of use' coincides with 'the place in which the most significant element or elements of the loss or damage occur or are likely to occur', as both rules target the same category of factors. Nevertheless, there is an important difference in the result the two rules lead to. The 'effective places of use' approach surely reduces the number of applicable laws when compared to *lex loci protectionis*, however, could still lead to application of more than one law to the situation if more than one country were to be considered effective places of use. The situation is not similar in relation to art (5a) as it is supported with specific presumption to point at one single law to be applied to the situation despite its ubiquitous nature.

To have one general flexible rule that can be applied to both traditional as well as to online scenarios should be favored. A rule that is specifically customized

⁵³⁶ Echoud, 2003, pp 208-209.

⁵³⁷ Note that WIPO has proposed 'market effect' doctrine to be applied to online trademark cases, and the rule was later adopted in relation to copyright. The doctrine seems to be accepted even in the other part of the world, namely in Japan. The 'Transparency working group' in Japan has proposed the inclusion of a similar rule in the Japanese PIL Act in relation to cross-border IP infringements. The proposed rule is a 'market impact rule' which leads to the application of the law of the country where the results of the exploitation of IP rights occur, this leads to results similar to the 'effective – use method'. For further details on the 'Transparency group' and the proposed 'market impact rule' see Paulius Jurcys, 'Applicable law to intellectual property infringements in Japan: Alternatives to the *lex loci protectionis* principle' [2009] available at <<http://ssrn.com/abstract=1527994>> last accessed 15 Oct 2012, pp 8-10 (hereafter referred to as Jurcys, 2009).

for online scenarios or satellite scenarios should also be expected to develop as rapidly as the online world develops, a matter that is impossible in practice. Supporting this approach is Prof. Von Hein who also favored adopting a flexible general rule to all situations⁵³⁸. Although his suggestion is in relation to violation of personality rights, yet the concept is one and can be extended to include moral rights, a general flexible rule should be adaptable to technological developments.

In point of fact, the difference between the real world and digital world should not be overestimated. The mere fact that a defamatory material for example is published online instead of in print should not necessarily lead to a different outcome in PIL⁵³⁹. In addition to that, in today's globalized world it is difficult to clearly identify where the injury occurred, even if one was able to identify the geographical borders of where injury to his personal reputation occurred, it does not mean that the injury will be limited to this particular identified jurisdiction. A very good illustrative example is given by Dr. Kuipers:

For example, academics specialized in European Union law or private international law inherently have an interest in protecting their good names throughout the European Union. If a Swedish author would be accused of plagiarism by a Slovakian colleague in a law review exclusively distributed in Slovakia, there would be an apparent interest in redress since, even if the author does not have any connections with Slovakia whatsoever, he will have to work together with Slovakian colleagues in international working groups and conferences. The place of injury would be impossible to define here...⁵⁴⁰

⁵³⁸ Cuniberti, 2010.

⁵³⁹ Kuipers, 2011, p1684.

⁵⁴⁰ Kuipers, 2011, p 1700.

B. Moral rights in cross-border contractual obligations

1. Proposed rule:

The law applicable to contractual waiver of moral rights should be the law of the place of habitual residence of the actual creator of the work when the work was created.

Nevertheless, one needs to keep in mind that, Rome I Regulation does not explicitly deal with or specifically address IP rights at the first place. Therefore, once the Regulation is amended to explicitly deal with IP rights either under its general rules⁵⁴¹ or by separate choice-of-law rules, only then one can make suggestions concerning moral rights. In which case, it is suggested to make the following change to art 10(1) Rome I Regulation to read as follows:

The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid. However, validity of contractual waiver of moral rights should be determined by the law of the place of habitual residence of the actual creator of the work when the work was created

2. Analysis:

As moral rights cannot be licensed or assigned, contractual waiver is the only way for these rights to be integrated into contracts. Nevertheless, validity of contractual waiver of moral rights is related to the grant of the right not the contract, hence, should not be subject to the law governing the contract.

In fact, the law applicable to existence of moral rights should naturally decide whether these rights can be waived or not. And as this 'new proposal' suggests application of the law of the place of habitual residence of the actual creator of

⁵⁴¹ Art 3 and 4 Rome I Regulation.

the work to question of existence, it further suggests the extension of its scope to cover question of validity of contractual waiver. As a result, the applicable law will not change depending on where the work is exploited or used.

C. Evaluation of the 'new proposal' against other connecting factors:

A connecting factor will connect the factual situation with a particular country⁵⁴², therefore, the search is for the law of the country with the most real connection with the legal dispute. The 'new proposal' suggests application of 'the place of habitual residence of the actual creator of the work' as its principal connecting factor. Questions of initial ownership, authorship, existence and scope of moral rights (in non-infringement scenarios) in addition to validity of contractual waiver of moral rights, are all to be determined by the law of the place of habitual residence of the actual creator of the work when the work was created.

The place of habitual residence of the actual creator of the work is a suitable connecting factor, as it is convenient to place one's legal relationships in the country where one is habitually residence. Moreover, as Dr. Morris argues, it is hard to see the 'most real connection' in any law other than one's 'domicile' or 'habitual residence'⁵⁴³.

Habitual residence as a personal connecting factor has gained international importance and recognition. It was used as a primary contact in several international conventions such as the Convention on the Protection of children and co-operation in respect of intercountry adoption 1993, Convention of civil procedure 1954, and Convention relating to the Status of Refugees 1951. As for the related conventions to the question of this thesis, habitual residence has been

⁵⁴² Castel, 1978, pp 2-2.

⁵⁴³ A. H. Paliwala, 'Habitual residence in Private International Law' (DPhil thesis, University of London 1972) 385 (hereafter referred to as Paliwala, 1972).

used in the BC, and at the EU level, habitual residence has been used in the Rome I and Rome II Regulations⁵⁴⁴.

However, what justifies favouring habitual residence over other connecting factors is the *balance* it strikes between copyright and general personality rights. Balance between copyright and general personality rights is essentially needed in relation to moral rights. This is because existence of these rights is attached to the existence of copyrighted works, whereas functionality of moral rights is in essence that of general personality rights⁵⁴⁵.

Habitual residence as a concept is the result of international unification efforts, especially at the Hague Conference on PIL⁵⁴⁶. The concept was created as an answer to the difficulties associated with 'nationality' and 'domicile' as connecting factors. As a personal connecting factor, habitual residence is considered to be a compromise between domicile and nationality⁵⁴⁷. Yet, the function of habitual residence as Cavers sees it is *not* a half way between domicile and residence, rather it is a suitable connecting between a person and a territory that is not based on the notion of headquarter. Clearly, habitual residence comes to an end when one stop using it habitually and therefore one could end up with no habitual residence anywhere⁵⁴⁸. Habitual residence is a

⁵⁴⁴ Moreover, art 19 of the new PIL law in Japan states that the law applicable to *defamation and damage to reputation* is the law of place of victim's habitual residence, the argument is that habitual residence reflects the closest connection with the infringement. For more details see Jurcys, 2009, pp 4-5.

⁵⁴⁵ See our previous discussion in Part 3 – Chapter III.

⁵⁴⁶ Paliwala, 1972, p 5.

⁵⁴⁷ Paliwala, 1972, pp 172, 204.

⁵⁴⁸ For more details see David F. Cavers, *The choice of law: selected essays 1933-1983* (Duke University press, Durham 1985) 246-249, 253 (hereafter referred to as Cavers, 1985).

factual concept rather than a legal one⁵⁴⁹, and its use was mainly supported by the '...disagreement in finding a uniform definition of domicile and also avoid questions of dependent domicile.'⁵⁵⁰

Selection of 'habitual residence' is compared to other potentially applicable connecting factors, in particular 'nationality' and 'domicile'. Yet, it is important to mention that nationality and domicile are strong alternative candidates only as connecting factors applicable to issues of authorship and ownership. Extension of the application of the same connecting factor i.e. habitual residence to existence and scope of moral rights, in addition to validity of waiver of moral rights, is not the conventional approach but is only what is proposed under our new proposal.

Moral rights are linked to copyright with respect to their existence. The new proposal recognizes this link and proposes to apply the law of habitual residence of the actual creator of the work to determine existence of copyright as well as moral rights (in non-infringement situations). As for the validity of waiver of moral rights, it is subject to the same choice-of-law rule because the actual interest is related to the grant of the right.

In relation to cross-border infringement scenarios, the chosen connecting factor is 'the most significant element or elements of the loss or damage'. Once again, this particular connecting factor was tested against other potentially applicable connecting factors before it was chosen, the strongest candidates in this category –besides *lex loci protectionis* which has already been eliminated- are the place with the closest connection to the dispute or most significant element and the defendant's place of residence or place of establishment.

⁵⁴⁹ However, Niboyet disagrees with this view and sees habitual residence as a term of law that is to be governed by *lex fori* to determine what constitutes habitual residence, Paliwala, 1972, p 457.

⁵⁵⁰ Paliwala, 1972, p 455.

1. Habitual residence vs. Author's nationality and author's domicile:

After the two World Wars millions of people were forced to leave home and ended up as 'stateless persons'. At the same time, economic growth increased mobility and move of people, and as a result 'nationality' as a connecting factor was no longer useful⁵⁵¹. The concept of 'domicile' developed between the 12-19th centuries, the strong move towards domicile started in the post-war period as an answer to the difficulties associated with 'nationality'. It was seen as a compromise between the notion of territoriality and personal law, nevertheless, the concept was not a satisfactory alternative because it had no uniform meaning⁵⁵². Hence the emergence of habitual residence as a connecting factor.

There are certain issues which are related to the person yet are not part of what is referred to in this thesis as general personality rights. These person-related rights or interests are one's legal capacity and personal status. These two primary issues are evidently related to the person, therefore, the applicable law to these matters had to be attached and connected to the person concerned no matter where he is. In reality, this line of thinking was behind the idea of applying personal law to issues related to persons⁵⁵³. Italian scholars argued that one's personal status and capacity should enjoy stability and consistency and this can only be achieved if these issues are subjected to the law of one's domicile. This was also supported by the French school as well as the Dutch school. Things however, changed in 1851 when Mancini published his article advocating for what he called principle of nations. He based his principle on his argument that laws are there to be

⁵⁵¹ Cavers, 1985, pp 246-249 , 253.

⁵⁵² Paliwala, 1972, pp 173, 186.

⁵⁵³ Hisham Ali Sadeq, *Lessons in private international law* (Al-Dar aljame'iah, Beirut, no publication year) 188 (hereafter referred to as Sadeq).

applied to persons not to jurisdictions. This particular argument marked the beginning of the emergence of the principle of personality of laws⁵⁵⁴.

In brief, most countries apply law of one's nationality or domicile to issues of personal status⁵⁵⁵, there is however, disagreement regarding whether nationality or domicile⁵⁵⁶ is the closest connection holding a person with certain legal system⁵⁵⁷. The argument supporting application of the law of one's nationality is that questions and issues related to the person's status and capacity are personal issues that need to be decided according to a personal law, this is expected to guarantee that the same law provides the same result wherever the person is⁵⁵⁸. The law of one's nationality is usually the law of the state where the person '... grew up, learned to acquire respect, consciously or unconsciously, for his social obligations and whose law, in the last analysis he has come to accept and trust...'⁵⁵⁹

On the other hand, the strongest argument in support of applying law of domicile is that one's settlement in a particular place makes his connection with this place stronger than his connection with the country of his nationality⁵⁶⁰. The same argument however, is used by some scholars in a negative sense, as to say that

⁵⁵⁴ Alsayed, 2007, pp 122-123.

⁵⁵⁵ Sadeq, p 187. For general discussion regarding domicile and other personal connecting factors see Clarkson and Hill, 2006, pp 20-51.

⁵⁵⁶ In general, before the French revolution the dominant connecting factor was domicile. However, after the revolution it changed to nationality, Hisham Khalid, *an introduction to Arabic private international law: a comparative study* (Dar Alfikr Aljamie, Alexandria 2003) 88-94 (hereafter referred to as Khalid, 2003).

⁵⁵⁷ Al'aal, 2007, p 23.

⁵⁵⁸ Sadeq, p 188.

⁵⁵⁹ Paliwala, 1972, p 221 citing Kegel.

⁵⁶⁰ Sadeq, p 192.

domicile gives consideration to the interests of the society rather than the true link the person shares with the country.⁵⁶¹

a. Nationality: In relation to author's moral rights, the issue is not exclusively related to the author's personality. The copyrighted work is a crucial factor that must be taken into consideration, and thus, one should ask whether there is any real connection between the author's nationality and his work? Nationality does not appear to have any real connection with the author and his work. Therefore, this point of attachment although applicable to one's capacity and legal status is not suitable for author's moral rights, because moral rights do not fall under capacity or legal status.

b. Domicile: The clear lack of connection between nationality and author's moral rights is less obvious when it comes to domicile as a connecting factor. It is true that nationality and domicile are commonly applicable to one's capacity and legal status. Yet, there are certain shared elements between domicile and habitual residence that make eliminating domicile in favor of habitual residence a tricky task⁵⁶².

Domicile and habitual residence are both based on one's connection with a certain place i.e. both require one's residence in a particular country. However, the crucial difference between the two connecting factors lies in the intention behind this residence. Domicile requires one to have *indefinite* intention to reside in a particular place⁵⁶³, however, habitual residence does not require indefinite intention to reside in a particular location. Rather, what is required is

⁵⁶¹ Paliwala, 1972, p 222.

⁵⁶² Note that the defendant's domicile is an essential connecting factor in relation to jurisdiction; Khalid, 2003, pp 88-94.

⁵⁶³ The test of intention is well established in the case law; for example in *Irvin v Irvin* [2001] 1 FLR 178 an intention to remain temporarily for duration of a job was not enough to establish domicile. For more details and case law regarding the test of intention as a requirement of domicile see Clarkson and Hill, 2006, pp 33-36.

for one to consider a particular place to be his *ordinary* home⁵⁶⁴. As the test for habitual residence is less demanding, the concept of habitual residence has been adopted by number of international agreements, for example The Hague Convention on Civil Procedure of 1896, Rome I Regulation and Rome II Regulation.

With regard to moral rights, 'habitual residence of the actual creator of the work' is favored over domicile for two main reasons: 1. The test for habitual residence is less demanding 2. The author strongly relates to the place where he is habitually resident when creating his work, as this place is where he ordinary resides and where he calls home, thus, is expected to know laws of his personal residence best. Therefore, authorship and initial ownership are to be determined by the law of this particular place. This cannot be applied to domicile, because an author could be living in country (x) where he has created his work, however, country (y) is where he attaches his indefinite intention to reside. In this situation country (y) has no real or actual connection with the work except for the author's intention. Accordingly, habitual residence is favored over domicile.

2. The place where the most significant element or elements of the loss or damage occur vs. The defendant's place of residence or place of establishment:

The defendant's place of residence or place of establishment as a connecting factor ignores the injured party i.e. the author. Furthermore, it could help infringers get away with their acts by choosing to carry out their acts in jurisdictions where there is weak or no moral rights protection. As a result, this connecting factor is rejected and the place where the most significant element or elements of the loss or damage occur is preferred.

⁵⁶⁴ There is no rule regarding the length of time required for a place to become home or the strength of intention; however, habitual residence is not acquired merely upon one's arrival to a country and an intention to remain in a country for short or limited period of time (e.g. for work or studies) is sufficient to establish habitual residence; Clarkson and Hill, 2006, pp 45-48.

3. The place where the most significant element or elements of the loss or damage occur vs. The place with closest connection to the dispute:

The place where the most significant element or elements of the loss or damage occur together with the place with closest connection to the dispute, are two connecting factors that reflect one principle which is identification of the country with most significant relationship with the issue and application of its law.

For example, the 'most significant relationship' is the adopted principle in The 2nd Restatement, the Restatement couples this principle with a list of choice-influential considerations that a court takes into account to determine which legal unity is that of the most significant relationship.

'The law of the place with the closest connection to the dispute' leads to a case by case solution⁵⁶⁵ which provides courts with flexibility and wider discretion power. The flexibility of this connecting factor was considered by commentators such as Professor Kuipers to be an overlooked advantage⁵⁶⁶ that '... would enhance legal certainty by the application of a single law to an infringement of personality rights...'⁵⁶⁷

However, what is considered as an advantage by some commentators is considered a disadvantage by others. Commentators such as Mr. Stone understand 'the closest connection' and 'most significant element' rule to be a 'formula of chaos'⁵⁶⁸.

D. Summation:

⁵⁶⁵ The closest connection '... could be tailored to fit the particular circumstances of each case...' Kuipers, 2011, p 1701.

⁵⁶⁶ Kuipers, 2011, p 1703.

⁵⁶⁷ Kuipers, 2011, p 1705.

⁵⁶⁸ Stone, 1995, p 5.

The principal connecting factor under the new proposal is 'The law of the place of habitual residence of the actual creator of the work when the work was created'. The proposition is to apply this particular law to determine issues of ownership, authorship, existence, scope and duration of moral rights (in non-infringement scenarios), in addition to validity of contractual waiver of moral rights.

Selection of this specific connecting factor is supported by several arguments:

Firstly, questions of ownership and authorship: There is no explicit rule in the related international and regional instruments that deal with the issue (except for art 14*bis* (a) BC concerning ownership of copyright in cinematographic works). As a result, commentators called for the application of *lex originis*. However, they failed to reach a unanimous agreement concerning the definition of the country of origin. Moreover, allocating the country of origin is further complicated when the work is first published online. Hence, these difficulties weakened *lex originis* and encouraged the search for other connecting factors. 'Habitual residence' as an alternative connecting factor is clearly identified. In addition, the place of the actual creator's habitual residence is not affected by the method of publication of the copyrighted work (whether printed or online).

Secondly, issues of existence, scope and duration of moral rights (in non-infringement scenarios): The conventional approach is to apply one choice-of-law rule to questions of existence, scope and duration of the right, in infringement and non-infringement scenarios. As a general rule, these legal issues are to be governed by *lex loci protectionis*. However, *lex loci protectionis* is based on the principle of territoriality which is an outdated principle. Furthermore, application of the rule leads to serious complications most notable of which is the application of multiple laws at the same time in ubiquitous infringement situations. For all the problems associated with application of *lex loci protectionis*, this writer calls for total abandonment of *lex loci protectionis*. Alternatively, she argues that the special nature of moral rights calls for the need to identify the interests that are actually affected in each situation. In non-

infringement situations, determination of existence, scope and duration of the right does not trigger State's role in finding a balance between public (users) and private interest (author). Accordingly, this writer believes that a distinction between infringement and non-infringement situations is a must. In non-infringement situations, as the State's task in striking a balance is not evident, this writer calls for application of the law of habitual residence of the actual creator of the work when the work was created. This is supported by the fact that the same law is proposed to determine ownership and authorship. Hence for reasons of uniformity the same law which determines who the author of the work is should determine existence, scope and duration of the right.

Thirdly, in relation to validity of contractual waiver of moral rights: Under the present situation, art 10(1) Rome I Regulation applies. According to which, validity and existence of a contract or a term in a contract depends on the applicable law if the contract or the term was valid. The general approach is that application of this rule to validity of contractual waiver of moral rights should be rejected. This is because validity of waiver is a matter related to the grant of the right. Hence, and as the present writer already argued for the application of habitual residence to determine authorship, existence, scope and duration of the right, she calls for application of the same law to determine the validity of contractually waiving moral rights.

The proposed applicable choice-of-law rule to infringement of moral rights in traditional and ubiquitous situations is 'The law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur'.

Selection of this rule should be approved for several reasons:

First of all, in relation to infringement of IP rights, *lex loci protectionis* is the internationally accepted rule. The rule is based on the principle of territoriality and its application is associated with serious complications. As the situation stands today, infringement of moral rights is subject to this particular rule, like the case with infringement of copyright in general. However, the current writer

is in favor of moving towards total abandoning of this rule, hence, she rejects its application to moral rights infringement.

Second of all, a choice-of-law rule that is to be based on the allocation method needs to determine the 'seat' of the legal relationship. To do so, one has to point out those interests that are actually harmed in infringement situations. With regard to moral rights, infringement of moral rights is an attack on *personality related interests* i.e. the author's right in his name, reputation and privacy. Therefore, this writer calls for attaching moral rights to general personality rights in cross-border torts. In the light of the recent developments at the EU level, this writer supports attaching moral rights to general personality rights under the proposed art 5a (in its final form) in the Rome II Regulation. That is application of the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur.

This place has evident connection with the legal issue at question. Moreover, it is general and flexible enough so that it applies to traditional as well as to online scenarios. In addition, this approach will find support from those in favor of applying the 'effective-use' rule to multi-state infringement cases. As questions of existence, scope and duration are raised during infringement proceedings, the law of the country where the most significant element or elements of the loss or damage occur or are likely to occur should also determine these questions.

E. Interim conclusions:

The aim of this 'new proposal' is to find the most suitable connecting factor that would be applied to moral rights in cross-border situations. As explained earlier in this research, moral rights reflect an intersection between copyright and general personality rights, the present legal situation addresses moral rights in conflict-of-laws as an element of copyright while ignoring the connection these rights share with general personality rights. On the other hand, scholars who call for detaching moral rights from copyright in conflict of laws, call for total

attachment of moral rights to general personality rights, therefore, ignoring the link moral rights have with copyright.

The 'new proposal' intended to select connecting factors that would recognize the link moral rights share with these two fields both in cross-border torts and contractual obligations. The analysis and evaluation of the chosen connecting factors reflected their suitability, and revealed the inadequacy of the other connecting factors.

Part 5

Conclusion

Conclusion

This thesis illustrated that attachment of moral rights to copyright in conflict-of-laws is inadequate. For this reason it suggested addressing the question of applicable law to cross-border moral rights disputes from alternative copyright perspectives.

A. Assessing the obvious inadequacy in the Status Quo:

In Part 2, where the status quo of moral rights was given detailed examination, three main problems were identified:

1. The complete disregarding to the position of moral rights in conflict-of-laws.
2. The complications of applying *lex loci protectionis* to moral rights.
3. The total silence in the international and regional instruments on the applicable law to authorship and validity of contractual waiver of moral rights.

The existence of these problems illustrates that the present legal framework is in need of a re-think. This necessarily opens the door for further investigation in search of alternative solutions.

B. Examining the existence of unsatisfactory solutions in the present proposals

Discussion throughout the thesis showed that there is limited number of studies and proposals dedicated to the question of moral rights in conflict-of-laws. Nevertheless, those few studies which propose to apply different choice-of-law rules to moral rights do so only on the basis of the personal link authors share

with their works. Hence, these proposals mainly revolve around the application of the author's personal law e.g. the author's nationality with regard to the question of authorship. Most if not all of these proposals submit to the territoriality principle adopted in international and regional instruments, applied in the context of infringement (in its traditional and ubiquitous sense). No serious arguments currently exist in the literature with regard to how the peculiar nature of moral rights effectively renders the territoriality principle irrelevant.

C. Exploring the validity of detaching moral rights from copyright in conflict-of-laws:

The search for solutions to the already identified problems began in Part 3 of this thesis. The limitations of the current proposals mean that there is room for a fresh perspective.

The thesis provided an investigation of the issues from an alternative perspective - more specifically from the perspective of general personality rights in conflict-of-laws. The thesis also explained the theoretical basis for choice-of-laws rules. It mainly focused on the Statutist theory and the allocation method, as the two most important ones to date. The 'allocation method' was recognized as the most used method in most countries in the world including the EU.

Accordingly, with regard to moral rights this thesis based its search for more appropriate choice-of-law rules on the allocation method. Under this method, what must be identified is the 'seat' of the legal relationship. The identification of a single seat in a legal relationship is favourable as it usually leads to uniformity of results regardless of where the case is brought.

This study also investigated the judicial decisions in relation to moral rights and general personality rights in both legal traditions. This examination was carried out with certain queries in mind, whether there was a tendency for courts to understand moral rights as part of personality rights rather than copyright in cross-border disputes. While civil law courts seem to have such a tendency, the

lack of cross-border moral rights disputes in common law courts meant that one can only speculate as to the future. Ultimately, the thesis argues that expectations for the position of cross-border moral rights in common law courts ought not be very different from those for civil law courts. This was based on the fact that common law tradition recognized and protected the essence of general personality rights and moral rights. Accordingly, it was concluded that common law tradition also recognized the similarity between the two sets of rights and these effects in conflict-of-laws.

D. The new proposal:

In Part 4 of this thesis a new proposal is offered. The new proposal addresses moral rights in cross-border contracts and in cross-border torts. The premise, upon which the newly proposed rules are based, recognises the link moral rights share with general personality rights and copyright. The link with the first is in terms of functionality, whereas the link with the second is in terms of existence and birth point. This is a crucial factor for determining the 'seat' of the legal relationship so that only the law most closely connected to the 'centre of gravity' is applied.

Thus, the thesis argues that the 'seat' in moral rights disputes differs from one situation to another:

1. Authorship and ownership: in order to determine who the author of the work is, there needs to be a single reference point so that authorship does not differ from one state to another. The proposal calls for application of the law of the place of habitual residence of the actual creator of the work, when the work was created. The question of who the author of the work is does not require an intervention from the sovereign power to strike a balance between the public and private interests. Instead, the issue is essentially understood to be related to the author. Therefore, a 'personal' connecting factor is favoured, and habitual residence is said to be more advantageous than domicile or nationality.

2. Questions of existence, scope and duration raised in non-infringement scenarios: since these questions are brought up in a non-infringement situation, the 'centre of gravity' arguably falls under the copyright category. The thesis proposed an application of the law of the place of habitual residence of the actual creator of the work when the work was created, calling for a clear departure from the territoriality principle and *lex loci protectionis*.

3. Questions of existence, scope and duration raised in infringement scenarios: since these questions are typically raised in infringement situation, the 'centre of gravity' arguably falls under the personality rights category. This is because the most significant element in infringement scenarios is the damage the author suffers. Author's interests that are subject to damage in infringement scenarios are almost identical to the damages incurred in personality rights infringement scenarios. Therefore, the thesis proposes to draft a particularly designed choice-of-law rule that is similar to article (5a), or to attach moral rights to the article proposed to be included in Rome II Regulation under the title 'Privacy and rights relating to personality including moral rights of authors and performers'. The proposed law to be applied is that of the country in which the most significant element or elements of the loss or damage occur or are likely to occur.

4. Ubiquitous infringement: As the rule proposed to be applied to moral rights infringement is generally flexible, there is no need to depart from it in relation to ubiquitous infringement. However, there is a need for a presumption as to where the most significant element or elements of the loss or damage occur. This is the law of the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised.

5. Validity of contractual waiver of moral rights: as the question is understood to be related to the grant of moral rights, the thesis proposes the application of the law of the place of habitual residence of the actual creator of the work. This is a natural consequence since existence of moral rights is to be subject to the same rule.

E. Final remarks and recommendations:

The difficulties of departing from the territoriality principle due to policy considerations cannot be ignored. Nevertheless, departing from norms has never been impossible. Moreover, for such departure to be achieved, it must be supported by scholarly works. This thesis is intended to be a contribution to the existing literature dealing with a branch of a general topic that is centuries old.

It is hoped that the following recommendations are taken into account in future considerations for the position of moral rights in conflict-of-laws:

- Selection of 'habitual residence of the actual creator of the work at the time the work was created' as the principle connecting factor. It is understood to reflect a realistic understanding for the 'personal' element in relation to moral rights combined with the other important factor which is copyright.
- Attachment of moral rights to general personality rights in cross-border infringement scenarios. The infringed interests of both sets of rights are purposely similar and hence, the 'seat' is no different.
- Favouring a rule that is flexible and general enough so that it applies to traditional and online scenarios. The overwhelming fast development of technologies call for the adoption of a general flexible rule that could easily accommodate future unexpected developments.
- Abandoning the *lex loci protectionis* rule in all international and regional instruments. This recommendation is clearly in contradiction with the currently applicable international conventions, or at least to their most accepted interpretation such as the BC. However, the approach followed by the new proposal is supported by the fact that the scope of *lex loci protectionis* has never been clear, furthermore, scholarly attempts both on individual and institutional levels (like the ALI principles) suggest that there is a growing tendency towards

limiting the application of *lex loci protectionis* in certain scenarios. Ultimately, it is no longer possible to look for solutions in a globalized world while one still maintains a territorial perspective.

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